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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA)
vs.) In Equity.
STATE OF WEST VIRGINIA.)

MOTION OF THE STATE OF WEST VIRGINIA FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER TO THE BILL OF COMPLAINT OF THE COMMONWEALTH OF VIRGINIA.

NOTICE.

Charleston, W. Va., March 10, 1914.

To the Honorable Jno. Garland Pollard,
Attorney General of Virginia,
Richmond, Virginia:

Please take notice that, in the suit of the Commonwealth of Virginia against the State of West Virginia, No. 2 Original, pending in the Supreme Court of the United States at Washington, D. C., the State of West Virginia will, on Monday, the 23rd day of March, 1914, move the said Court for leave to file, on or before the thirteenth day of April, 1914, a supplemental answer to the original bill of complaint filed in said Court by the Commonwealth of Virginia against said State.

A copy of said motion, as well as of the grounds therefor, and of the proposed supplemental answer, are hereto appended for your information.

Respectfully,

STATE OF WEST VIRGINIA,

By A. A. Lilly,

Attorney General for West Virginia.

IN THE

Supreme Court of the United States.

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No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA)
vs.) In Equity.
STATE OF WEST VIRGINIA.)

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now, comes the defendant, the State of West Virginia, by A. A. Lilly, her Attorney General, and moves the Court for leave to file, on or before the thirteenth day of April, 1914, a supplemental answer to the bill of complaint of the Commonwealth of Virginia filed herein against her.

The notice of this motion, together with the service thereof and the grounds of said motion, as well as a copy of the proposed supplemental answer, are presented herewith.

STATEMENT OF FACTS.

By its opinion of March 6, 1911, in this cause, this Court held that the State of West Virginia, in consequence of Section 8 of her Constitution of 1861, the Act of the Legislature of the restored State of Virginia passed May 13, 1862, consenting to the erection of the new State under the provisions of said Constitution, and the Act of Congress of December 31, 1862, giving sanction to its creation, became obligated to pay an equitable proportion of the public debt of Virginia existing prior to the first day of January, 1861, and by said opinion ascertained the total indebtedness as of that date to be apportioned between the two States to be $30,563,861.56.

Virginia v. West Virginia, 220 U. S., 1.

It was also there held that, in consequence of the relative resources of the two debtor populations, exclusive of slaves, 76½% of said debt should be apportioned to Virginia, and 23½% thereof to West Virginia, and, upon this basis, West Virginia's proportion of the principal of the debt was fixed at $7,182,507.46. No decree, however, was entered against her for that amount, but a conference was suggested between the two States looking to an amicable settlement of the matters in difference.

In the same opinion, and while discussing a division of the assets of the old Commonwealth in the purchase of which her debt had been incurred, it was stated that *"it does not appear that there are any stocks of value on hand"*, and, as a necessary

consequence, as the record then stood, there were no credits applicable to the reduction of West Virginia's ascertained proportion of the principal of the debt, and it remained as fixed.

Subsequently, however, and in willing obedience to the suggestion of this Honorable Court, the Governor of West Virginia, after the passage of a joint resolution by the Legislature of the State authorizing him so to do, appointed a Commission to treat with the State of Virginia, and this Commission, during the course of its labors, after the filing of the original answer herein, and after the delivery of the opinion aforesaid of March 6, 1911, discovered the live assets set forth in the accompanying proposed supplemental answer, which had been purchased with the common funds of the two States prior to the first day of January, 1861, and retained, sold or given away by the Commonwealth of Virginia after the twentieth day of June, 1863, without accounting to West Virginia for any part thereof, and amounting, in the aggregate, as it is alleged, to $20,810,357.98.

West Virginia, feeling that she was entitled to a just proportion of these assets, and believing that, if they had been presented by the record at the time of the opinion of March 6, 1911, this Court would have given her credit for 23½% thereof, proposed to the State of Virginia at a joint conference held at Washington on the fourth day of March, 1914, that she allow 23½% of the value of said assets as of the first day of January, 1861, as a credit upon West Virginia's portion of the principal of said debt as fixed by this Court, and that she would cause to be

paid unto Virginia the balance, after making said deduction, or the sum of $2,327,195.27, in full settlement of principal and interest of West Virginia's equitable proportion of said debt.

Interest was to be omitted for the reasons given and the facts enumerated in the proposition, and now more in detail alleged in the proposed supplemental answer.

Virginia declined the proposition, expressing an unwillingness even to discuss the question of principal, because the same, according to her view, had been irrevocably fixed by this Court, and, upon the question of interest, although she considered that still open, contented herself with ignoring the reason given by West Virginia why no interest should be charged.

Here the negotiations ended, and the present motion follows.

OBJECTS OF THE MOTION.

One of the objects of the motion is to obtain leave to file a supplemental answer, presenting assets purchased with the common funds prior to January 1, 1861, and appropriated thereafter by the State of Virginia to her exclusive use, and to 23½% of which West Virginia, according to the basis of liability fixed by this Court, is entitled as a credit upon her equitable proportion of the principal of the Virginia debt; and the other is by said supplemental answer to present certain facts why West Virginia should not be charged with interest upon whatever proportion of the principal of said debt may be decreed against her.

GROUNDS OF MOTION.

It is respectfully submitted that said supplemental answer should be permitted to be filed for the following reasons and upon the following grounds:

I. Because the value and disposition of the assets set up in the supplemental answer, purchased with common funds prior to January 1, 1861, disposed of after June 20, 1863, and appropriated by Virginia to her exclusive use, were discovered mostly by the defendant, if not wholly, since the last continuance;

II. Because the evidence of the existence, value and disposition of said assets was in the possession of the State of Virginia, and she did not volunteer the disclosure thereof, although the object of this suit, instituted by her, was the ascertainment of West Virginia's *equitable* proportion of the Virginia debt;

III. Because, while greater diligence might be required of individuals to ascertain the evidence governing their rights, when in controversy, yet, in the case of a State, no such requirement can obtain, for the reason that it is represented by officials whose tenures of office are frequently of short duration, and whose chief executive may not, under its Constitution, as in the case of the defendant, succeed himself, thereby breaking the chain of knowledge of public affairs, especially when it relates to the records of other States, and destroying the continuity

of information that must be passed from one administration to another;

IV. Because the decree of reference executed in this case did not specifically, if at all, call for the discovery of the assets now disclosed and presented for the first time (see decree, Virginia v. West Virginia, 209 U. S., 514);

V. Because the right of West Virginia to be credited with 23½% of the value of the assets by the purchase of which the debt was created constitutes an equity just as *"deep seated"* as the obligation to pay 23½% of the debt so created. The one is the exact measure of the other;

VI. Because an examination of the said supplemental answer discloses a large amount of bonds, stocks and other securities applicable to the discharge of the entire debt created by the Commonwealth of Virginia prior to January 1, 1861, and were designed to be so applied by the Constitution of Virginia, adopted in 1851, and which Constitution was the organic law of Virginia at the time West Virginia adopted her first Constitution in 1861, and when the Commonwealth of Virginia passed the Act of legislation in May, 1862, giving her consent to the formation of West Virginia as one of the States of the Union, and the law of Virginia became the law of West Virginia, and so remained the law of said last named State, not altered or repealed by West Virginia after her admission into the Union; and the provisions of the Constitution of Virginia making the said stocks, bonds and other securities avail-

able for the payment of the said debt governed and controlled their application to the payment of this debt before and at the time of the admission of West Virginia into the Union as one of the States thereof, and,

VII. Because, in addition to the grounds already stated, the proposed supplemental answer alleges new facts and presents new reasons why interest should not be charged against West Virginia. These are money received by Virginia derived from the common investment and common assets appropriated by her, which are not embraced in those assets out of which credits are claimed upon the principal of the debt. They are set off against interest alone, and amount to many millions of dollars. Such is the item of $5,782,240.09, representing dividends upon stocks not otherwise accounted for, and such are the public buildings constructed and equipped out of the common funds, and retained by Virginia, as well as much personal property, consisting of libraries, arms and munitions of war.

A. A. LILLY,
Attorney General
for West Virginia.

V. B. ARCHER,

CHAS. E. HOGG,
and

JOHN H. HOLT,
Associate Counsel
for West Virginia.

ANSWER

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

THE SUPPLEMENTAL ANSWER OF THE STATE OF WEST VIRGINIA TO THE BILL OF COMPLAINT EXHIBITED AGAINST HER HEREIN BY THE COMMONWEALTH OF VIRGINIA:

Now comes the defendant, the State of West Virginia, by A. A. Lilly, her Attorney General, and, by leave of Court first had and obtained, files this her

supplemental answer to the bill of complaint of the plaintiff filed herein against her, and alleges:

FIRST: That, prior to the establishment of the State of West Virginia out of the territory of the Commonwealth of Virginia on the twentieth day of June, 1863, and prior to the first day of January, 1861 (West Virginia, by her Constitution, having assumed an equitable proportion of the public debt of the Commonwealth of Virginia existing prior to the latter date), the Commonwealth of Virginia purchased with the bonds that evidenced her public debt existing prior to the first day of January, 1861, or out of the proceeds of the sale thereof, certain stocks, bonds, securities and other properties, and made loans to various persons and companies, and was the owner and holder of said stocks, bonds, securities and other properties on the first day of January, 1861, as well as upon the twentieth day of June, 1863, and, after said last named date, has continued until the present time to hold, own and enjoy the fruits of a portion of said securities and properties; has sold certain other portions thereof for many millions of dollars; collected said loans, and given away the residue of said securities, without the knowledge or consent of this defendant, except as hereinafter stated;

That that portion of said securities so retained by the Commonwealth of Virginia consisted of stock in the Richmond, Fredericksburg & Potomac Railroad Company, amounting to $275,200.00, and certain bank stocks owned by the State of Virginia, amounting to $3,710,020.00, and had, as this defendant is now informed, an actual commercial and market val-

ue, both on the first day of January, 1861, and the twentieth day of June, 1863, of at least $3,985,220.00;

That the securities aforesaid sold by her after the twentieth day of June, 1863, except as hereinafter set out, consisted of stock owned in various railroad companies, which was subsequently sold by her to the Atlantic, Mississippi & Ohio Railroad Company at the price of $4,000,000.00, and stocks in and loans to various other railroad and canal companies, including a loan to the Government of the United States and a claim against Selden-Withers Company, which stock she sold and loans collected, and received therefor the sum of $6,313,532.47, which securities and loans had, as this defendant is now informed, an actual value, both upon the first day of January, 1861, and the twentieth day of June, 1863, of $10,313,532.47;

That the residue of the securities so sold by her consisted of stock in the Manassas Gap Railroad Company, Roanoke Valley Railroad Company, and certain other railroad companies hereinafter described, and stock in certain navigation and canal companies, likewise hereinafter described, with an aggregate par value of $3,885,076.68, which said stocks, as this defendant is now informed and believes, had an actual value, both on the first day of January, 1861, and the twentieth day of June, 1863, of twenty-five per cent. of their par, or $971,269.17;

That the securities and property so given away by her subsequent to the twentieth day of June, 1863, consisted of 104,000 shares of stock in the James River and Kanawha Company, with a par value of $10,400,000.00, which stock, as this defendant is now

informed and believes, had an actual value, both on the first day of January, 1861, and the twentieth day of June, 1863, of twenty-five per cent. of its par, or $2,600,000.00;

That, after the foregoing securities had been purchased and loans made, there accrued dividends upon the one and interest upon the other prior to January 1, 1861, which were collected by the Commonwealth of Virginia after that date, and mostly after the twentieth day of June, 1863, amounting in the aggregate to $1,835,409.28;

That, as this defendant is now informed, the State of Virginia, after the division of the old Commonwealth into two States (June 20, 1863), collected large amounts of money from several Counties then and now located in the State of West Virginia, aggregating the sum of $225,078.06;

That, in addition to the foregoing securities and properties so retained or disposed of as aforesaid, and the collections made as aforesaid, by the Commonwealth of Virginia, she had in her treasury on the first day of January, 1861, cash amounting to $1,104,927.06;

That the total of said assets on the first day of January, 1861, and the twentieth day of June, 1863, excluding the sum of $225,078.06, collected from West Virginia Counties as aforesaid, had a reasonable value of $20,810,357.98;

That these assets were available for the discharge of the debt of the Commonwealth of Virginia existing prior to the first day of January, 1861, and, if they had been so applied, would have greatly diminished the same; but that, instead of so applying them, the plaintiff, the Commonwealth of Virginia,

has, as aforesaid, retained a portion thereof, and devoted the same to her own exclusive use, without the knowledge or consent of this defendant; sold other portions thereof without the knowledge or consent of this defendant, and appropriated the proceeds thereof to her individual use, and, without such knowledge or consent, has made certain collections as aforesaid, and given away the residue of said assets, except as hereinafter stated, and has neither reported to this defendant any of said transactions nor has accounted unto her, either in whole or in part, for the value of the assets so retained or given away, or for the proceeds of such as were sold or collected by her;

That this defendant was interested in said assets to the extent of her just proportion of the value thereof as of the first day of January, 1861, and was the equitable owner of, and entitled to receive out of the proceeds thereof, according to the basis of liability fixed by this Honorable Court, 23½% of the sum of $20,810,357.98, and the whole of $225,078.06, collected by Virginia from West Virginia Counties, as aforesaid, making an aggregate of $5,115,512.19;

That out of the assets neither sold nor given away, but retained by the Commonwealth of Virginia, as aforesaid, she did turn over to the State of West Virginia a part of her stock in the Northwestern Bank, amounting to $210,200.00, and the whole of her stock in the Fairmont Bank, amounting to $50,000.00, making an aggregate of $260,200.00, which, when deducted from the aforesaid sum of $5,115,512.19, would leave a balance of $4,855,312.19, representing West Virginia's equitable proportion of

said assets so retained, sold, collected or given away by the Commonwealth of Virginia, which said sum should be applied as a credit upon and deducted from the sum of $7,182,507.46, alloted by this Honorable Court as West Virginia's equitable proportion of the principal of the Virginia debt, which would reduce said principal to the sum of $2,327,195.27.

The names and descriptions of said stocks, bonds, securities and other properties, as well as the time and manner of their acquisition by the Commonwealth of Virginia, the time and manner of their disposition by said State, and the amounts of money received therefor and appropriated by the Commonwealth of Virginia are hereinafter set out in detail in paragraph six of this supplemental answer.

SECOND: That this defendant, both at the time of the filing of its original answer herein and at the date of the fixing by this Honorable Court of the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed, was ignorant of the value of the stocks, bonds, securities and property aforesaid, and did not then know that the same had been sold by the Commonwealth of Virginia, and large, or any, sums of money derived therefrom; that the knowledge of these facts was peculiarly within the possession of the plaintiff, the State of Virginia, and that said State never at any time informed this defendant of the value of said properties, or any of them, or reported to her that moneys had been derived therefrom and appropriated, either wholly or in part, to the exclusive use of the State of Virginia.

She further says that she did not discover the

value and disposition of these securities until after the appointment of a Commission by her Governor on the 19th day of April, 1913, pursuant to a joint resolution passed by the two Houses of her Legislature on the 21st day of February, 1913, for the purpose of attempting, in accordance with the suggestion of this Honorable Court, an amicable adjustment of the matters here in controversy with a like Commission from the State of Virginia, and that her said Commission has, since the filing of the original answer herein and the opinion of the Court hereinbefore referred to of March 6, 1911, discovered the matters hereinbefore and hereinafter set out in this her supplemental answer;

THIRD: That, after the Commissions of the two States had met in joint conference in the City of Washington on the 25th day of July, 1913, and had adjourned to meet at a later day, the West Virginia Commission met at Charleston on the 12th day of August, 1913, and appointed a sub-committee out of its own membership, for the purpose of making a complete examination into all the matters involved in this controversy, with the view of submitting a proposition to the Virginia Commission, which said sub-committee entered promptly upon its work, and diligently pursued its investigations until on or about the 27th day of February, 1914, at which time it completed its labors and reported the result thereof to the full West Virginia Commission;

That, during the investigations made by the sub-committee aforesaid, it discovered the matters and things hereinbefore and hereinafter alleged with respect to the value and disposition of the stocks,

bonds and other securities and property owned by the Commonwealth of Virginia on the first day of January, 1861, and retained or disposed of by her after the twentieth day of June, 1863, and embodied the same in its report on the 27th day of February, 1914, to the West Virginia Commission, and, at the same time, formulated and reported a proposition of settlement based thereon, with the recommendation that the same be made by the West Virginia to the Virginia Commission.

The substance of the proposition so formulated was that, if the Virginia Commission would allow to the State of West Virginia 23½% of the value as of the first day of January, 1861, of the stocks, bonds, securities and other properties owned by her on that day, and subsequently disposed of by her, hereinbefore referred to and hereinafter described in detail, as well as the whole amount of moneys ($225,078.06) collected by Virginia from West Virginia Counties after the separation of the two States, after deducting the amount of bank stocks ($260,200.00) theretofore turned over by Virginia to West Virginia; that is to say, the sum of $4,855,312.19, as a credit upon the sum of $7,182,507.46, ascertained, as aforesaid, by this Honorable Court to be the part of the principal of the Virginia debt assumed by the State of West Virginia, and accept the balance so ascertained in full settlement, both principal and interest, of West Virginia's equitable proportion of the Virginia debt, then, and in that event, the West Virginia Commission would at once report that fact to the Governor of the State of West Virginia, with the request and recommendation that he immediately convene in

extraordinary session the Legislature of that State, for the purpose of adopting or rejecting the recommendation of the West Virginia Commission, and for the further purpose, in the event of its adoption, of providing the means, without further delay, of paying unto the State of Virginia, as Trustee for her bondholders, the sum of $2,327,195.27, in full settlement of that portion of the Virginia debt assumed by the State of West Virginia.

The West Virginia Commission, upon receiving the report of said sub-committee, and after an examination and discussion thereof, approved and adopted the same; and, thereupon, a joint conference of the Virginia and West Virginia Debt Commissions was called to meet at the City of Washington on the fourth day of March, 1914. The two Commissions convened at the time and place designated, and the West Virginia Commission made, in writing, to the Virginia Commission its proposition of settlement aforesaid, and accompanied the same, as a part thereof, with a tabulated statement of the stocks, bonds, securities and other properties 23½% of the value of which she claimed as a credit upon her ascertained proportion of the principal of the Virginia debt assumed by her. This proposition, however, was rejected by the Virginia Commission, and, thereupon, the conference ended, as well as the negotiations between the two Commissions. A true copy of said proposition, together with a true copy of the tabulated statement of the stocks, bonds, securities and other property therein referred to and thereto appended, as well as a copy of the letter of the Chairman of the West Virginia Commission transmitting

the same to the Virginia Commission, are herewith filed as a part of this supplemental answer, and marked "Exhibit A". A true copy of the reply of the Virginia Commission thereto, as well as a copy of the letter of the Chairman of said Commission transmitting the same, are likewise exhibited herewith as a part hereof, and marked "Exhibit B". A true copy of the rejoinder of the West Virginia Commission to the reply of the Virginia Commission is also exhibited herewith as a part hereof, and marked "Exhibit C".

FOURTH: This defendant further alleges that, under the provisions of Sections 28, 29 and 30 of the Constitution of Virginia of 1851, in force January 1, 1861 (Code of Virginia, 1860, page 47), she became, and was, entitled, under her Constitution adopted and in force on June 20, 1863, to an equitable proportion of and interest in the stocks, bonds and other securities, credit and settlement for which she now seeks to obtain by her supplemental answer;

That, under the provisions of Section 29 of said Constitution, a sinking fund was created; that, under the provisions of Section 30 of said Constitution, it was provided that the General Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies, but the proceeds of such sale, if made before the payment of the public debt, should constitute a part of the sinking fund, and be applied in like manner.

This defendant claims that, under these provisions of the Constitution, the Commonwealth of Virginia held, owned and was entitled to possess and sell the securities which she had acquired by the

issue and sale of the bonds constituting the common debt, and that West Virginia, by her contract (Sec. 8, Art. VIII. of her Constitution), while assuming an equitable proportion of the Virginia debt, nevertheless acquired a proportional interest in these securities belonging to the sinking fund, measured by her equitable proportion of the debt, and that she had a vested interest in these securities which could not be divested by any subsequent constitutional provision adopted by the Commonwealth of Virginia, or by any legislative enactment other than authorized by the said sections of the Constitution of 1851.

FIFTH: This defendant, further answering, says that, as will appear from the Acts of the Legislatures of the two States, both States contemplated a fair division of the property belonging to Virginia upon the settlement of the controversy between the two States with reference to the said debt and the proportion thereof assumed by West Virginia in which West Virginia was interested before she became an independent State, and that both States declared for a fair division of the property, always, however, in connection with the ascertainment and adjustment of the equitable proportion of the debt assumed by West Virginia under her Constitution. And this defendant avers that she is advised and believes, and, upon such advice and belief, avers, that the property referred to evidently meant the stocks, bonds and other securities in the possession of Virginia possessing a commercial value, and available as assets for the discharge of the said debt, and that too without any impediment to or interference with the ordinary operations of the State government; and

the defendant avers that it has always been the policy of Virginia to apply these assets to the payment of the said debt, and, in support thereof, this defendant avers that, in the Constitution of Virginia adopted in 1864, as shown by the "Acts of the General Assembly of Virginia, 1861-1865", on pages 15 and 16 thereof, the following provision with reference to the public debt appears:

> "The General Assembly may at any time direct the sale of the stocks held by the Commonwealth in internal improvement and other companies located within the limits of this Commonwealth, but the proceeds of such sale, if made before the payment of the public debt, shall be appropriated to the payment thereof."

On the twenty-eighth day of February, 1866, a joint resolution bearing upon the adjustment of the debt between the two States, appearing in the Acts of Assembly of Virginia of 1865-6, at page 453, was adopted, the third paragraph of which reads as follows:

> "The commissioners appointed under the foregoing resolution are also empowered and directed to treat with the authorities of West Virginia upon the subject of the proper adjustment of the public debt of Virginia due or incurred previous to the dismemberment of the State, and of a fair division of the public property; subject, however, to the approval or disapproval of this General Assembly."

This resolution was adopted within less than three years after the State of West Virginia was admitted to the Union, and is expressive of the attitude of Virginia relating to the equities of West Virginia in the assets of the former State applicable to the discharge of the public debt.

On February 18, 1870, an Act of the General Assembly of Virginia was passed, appearing on page 8 of the Acts of the General Assembly of Virginia for 1869-1870, with reference to the adjustment of the public debt, the first section of which is as follows:

> "Be it enacted by the General Assembly that three commissioners, resident citizens of this State, be appointed by the Governor to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia due or incurred previous to the dismemberment of the State, and a fair division of the public property; provided, however, that the action of the said commissioners shall be subject to the approval or disapproval of this General Assembly."

SIXTH: This defendant, further answering, says that the history of the purchase, ownership, value and final disposition by the State of Virginia of the stocks, bonds and other securities and properties hereinbefore referred to in the first paragraph of this supplemental answer is as follows:

SECURITIES RETAINED BY VIRGINIA.

1. Under and by virtue of two Acts of the General Assembly of Virginia, the one passed on Jan-

uary 23, 1835, and the other on March 23, 1836, the Commonwealth of Virginia purchased 2,752 shares of stock, of the par value of $100 each, in the Richmond, Fredericksburg & Potomac Railroad Company, and paid therefor the sum of $275,200.00, which purchase money was derived either from taxation or from the proceeds of the sales of a portion of the bonds that evidenced the debt in controversy here, and constituted a common fund, 23½% of which was owned by this defendant, and 76½% thereof by the State of Virginia. The stock so purchased was never disposed of by the Commonwealth of Virginia, and was owned by her on the first day of January, 1861, and is still so owned and held. Said stock, this defendant is now informed, and, upon such information, alleges, was dividend paying on the first day of January, 1861, and on that date, as well as on the twentieth day of June, 1863, was worth in the market, at the very least, the sum of $275,200.00.

This defendant is further informed, and, upon such information, alleges, that said stock has continued to pay dividends from January 1, 1861, to the present time, and that, during that period, has not only paid to the State of Virginia in cash dividends the sum of $1,282,198.74, but that she has received, in addition thereto, on account of said stock, and in the form of stock dividends, the sum of $319,615, which dividend stock bears the same rate of dividend as the original stock.

2. Prior to the first day of January, 1861, the Commonwealth of Virginia purchased, and paid for out of the common funds of the plaintiff and the

defendant, stock in the following banks, of the par value as herein set out; that is to say:

Farmers' Bank of Virginia	$962,600.00
Bank of Virginia	963,620.00
Bank of the Valley	483,900.00
Exchange Bank	875,500.00
Northwestern Bank	374,400.00
Fairmont Bank	50,000.00
Total	$3,710,020.00

This defendant is informed, and upon such information alleges, that the foregoing bank stocks were, at the least, worth par on the first day of January, 1861, and continued to be worth par, or more, from that date until long after this defendant was separated from the Commonwealth of Virginia on June 20, 1863. It further says, upon information and belief, that said bank stocks, both upon the first day of January, 1861, and upon the twentieth day of June, 1863, and for sometime thereafter, were regularly paying dividends of from seven to eight per cent. per annum.

This defendant further says that the Commonwealth of Virginia appropriated the whole of said stock unto her own exclusive use, except $210,200 of the stock held and owned by her in the Northwestern Bank, and her stock in the Fairmont Bank, amounting to $50,000.00, which stocks were turned over by her to this defendant.

SECURITIES PURCHASED BY VIRGINIA PRIOR TO JANUARY 1, 1861, AND SOLD AFTER JUNE 20, 1863.

1. Prior to January 1, 1861, the State of Virginia, with the common funds of the two States, bought stocks of and made loans to each of the following railroad companies:

Virginia and Tennessee Railroad Company,
Southside Railroad Company,
Virginia & Kentucky Railroad Company,
Norfolk & Petersburg Railroad Company,

and from time to time sold portions of said stock, until she had left on hand a residue of stocks therein and loans thereto that cost her:

Virginia & Tennessee Railroad Company,	
Stock	$2,300,000.00
Southside Railroad Company,	
Stock	803,500.00
Loans	708,102.34
Virginia and Kentucky Railroad Company,	
Stock	82,000.61
Norfolk & Petersburg Railroad Company,	
Stock	1,139,970.00
Loans	134,975.51
Total	$5,168,548.46,

which residuary stocks and loans she subsequently; that is to say, on the twentieth day of December, 1870, sold to the Atlantic, Mississippi & Ohio Rail-

road Company for the sum of $4,000,000.00. The purchase price was to be paid in instalments, and a second mortgage was taken upon the property of the Atlantic, Mississippi & Ohio Railroad Company to secure the payment of the same. This sale was made and this security taken without the knowledge or consent of this defendant; and finally, after the lapse of many years, the first mortgage on the property of the Railroad Company was foreclosed, and the property embraced therein sold, but did not bring enough to satisfy the second mortgage and pay the $4,000,000.00 debt to the State of Virginia. Notwithstanding that fact, the Atlantic, Mississippi & Ohio Railroad Company was subsequently reorganized, and, on the first day of March, 1882, paid into the treasury of the State of Virginia the sum of $500,000.00 for her interest in said second mortgage.

This defendant further says that she is informed, and upon such information charges, that the stocks so purchased in said railroads, as aforesaid, and the loans so made to them, were of the market value of $4,000,000.00, or more, not only as of the first day of January, 1861, but as of the twentieth day of June, 1863.

2. Virginia also, prior to the first day of January, 1861, purchased with the common funds of the two States shares of stock in the following railroad companies, and out of said funds made loans to said railroads, and subsequently collected the principal of said loans and sold said stocks, and likewise collected a claim against the Government of the United States, and another against Selden-Withers Company, and realized therefrom the amounts hereinaf-

ter next set out, and has never accounted unto this defendant for its proportionate part thereof; that is to say:

Orange & Alexandria Railroad Company, Stock and loan	$1,156,210.98
Richmond & Danville Railroad Company, Stock and loan	1,653,423.04
Richmond & Petersburg Railroad Company, Stock	578,404.13
Virginia Central Railroad Company, Stock and loan	321,458.17
Blue Ridge Railroad Company, (Built by State of Virginia)	705,280.82
Alexandria, Loudoun & Hampshire R. R. Co., Stock	68,044.51
Winchester & Potomac Railroad Company, Loan reduced by annuity	83,333.33
Virginia & Tennessee Railroad Company, Loan	992,030.32
Southside Railroad Company, Loan	91,897.66
Norfolk & Petersburg Railroad Company, Loan	165,024.49
Roanoke Navigation Company, Stock	3,832.00
Alexandria Canal Company, Stock	816.00
Upper Appomattox Company, Stock	16,144.26
Dismal Swamp Canal Company, Stock	24,839.98
Loan to Washington College	2,000.00
Richmond Academy, Bonds	400.00
Claim against United States Gov'ment	298,369.74
Claim against Selden-Withers Company	152,023.04
Total	$6,313,532.47

RESIDUE OF SECURITIES PURCHASED BY VIRGINIA PRIOR TO JANUARY 1, 1861, AND SOLD AFTER JUNE 23, 1863.

The residue of the securities purchased by the State of Virginia with common funds prior to January 1, 1861, and disposed of by her subsequent to that time in one way and another, and not hereinbefore recapitulated, consisted of stocks in the following railroad, navigation and canal companies, the actual value of which, as of the first day of January, 1861, and of the 20th day of June, 1863, in consequence of the lapse of time and the consequent obscurity of the evidence relating to such value, is unknown to this defendant, but the par value of which is set opposite the name of each company as follows, to-wit:

Manassas Gap Railroad	$2,105,000.00
Roanoke Valley Railroad	307,402.00
Fredericksburg & Gordonsville R.R.	132,399.00
Richmond & York River R. R.	490,999.52
Rappahannock Company	179,500.00
Rivanna River Navigation Co.	227,133.00
Smith's River Navigation Co.	4,083.12
Slate River Co.	21,000.00
Kempsville Canal Company	13,650.00
Hazel River Navigation Co.	63,079.58
Goose Creek & Little River Co.	58,255.35
Dragon Swamp Navigation Co.	1,464.00
Chesapeake & Ohio Canal Co.	281,111.11
Total	$3,885,076.68

And this defendant says that she believes, and charges upon such belief, that these securities last above enumerated had an actual value, both on the 1st day of January, 1861, and the 20th day of June, 1863, of 25% of their par, or $971,269.17.

INTEREST ON LOANS AND DIVIDENDS ON STOCK.

This defendant is also informed, and upon such information alleges, that, after the Commonwealth of Virginia had, as hereinbefore set out, purchased with the common funds of this defendant and of the plaintiff the bank and railroad stocks hereinbefore described, and had made unto the various railroad companies and persons hereinbefore set out the various loans herein set forth, she, prior to the first day of January, 1861, became entitled to dividends upon said stocks and to interest upon said loans in the aggregate sum of $1,835,409.28, and, after the first day of January, 1861, collected the same, but did not apply the same to the discharge of her indebtedness existing prior to the first day of January, 1861, and has never paid or accounted unto this defendant for any part thereof.

The names of the various Companies and the amounts received from each, as aforesaid, whether as dividends upon stock or as interest upon loans, are as follows:

Orange & Alexandria Railroad Company	$18,144.29
Richmond & Danville Railroad Company	8,516.80
Richmond & Petersburg Railroad Co.....	43,048.00

Virginia Central Railroad Company....	182,436.36
Winchester & Potomac Railroad Company	833.33
Richmond, Fredericksburg & Potomac R. R. Company.....	157,662.07
Virginia & Tennessee Railroad Company	211,891.82
Southside Railroad Company.....	204,602.34
Norfolk & Petersburg Railroad Company	45,900.00
James River & Kanawha Company.....	250.00
Loan to Washington College.....	60.00
Richmond Academy Bond.....	12.00
Claim against United States Government	832,451.57
The Farmers' Bank of Virginia.....	33,691.00
Bank of Virginia	33,726.70
Bank of the Valley.....	16,936.50
Exchange Bank	30,642.50
Northwestern Bank	13,104.00
Fairmont Bank	1,500.00
Total.....	$1,835,409.28

SECURITIES AND PROPERTY GIVEN AWAY BY VIRGINIA.

This defendant, further answering by way of supplement to her original answer, says that the Commonwealth of Virginia, pursuant to the terms and provisions of certain Acts of her General Assembly, the first passed upon the 16th day of March, 1832, the second upon the 14th day of February, 1834, the third upon the 24th day of January, 1835, and the fourth upon the 23rd day of March, 1860, purchased, and from time to time became the owner of, certain shares of stock in the James River & Kanawha Company, until the aggregate number of shares

owned by her in said Company prior to the first day of January, 1861, amounted to 104,000 shares, with an aggregate par value of $10,400,000.00;

That, prior to the 23rd day of March, 1860, she had purchased and owned shares of this stock amounting in the aggregate, at par, to $3,000,000.00, and, under the provisions of an Act of her General Assembly passed on March 23, 1860, she purchased, prior to the first day of January, 1861, $7,400,000.00 more of this stock, paying therefor par, partly in cash, partly by the assumption of certain debts due from the Company to others, and the residue by the exchange of a debt owed by the Company to the Commonwealth of Virginia for an equal amount of the Company's stock at par;

That the State of Virginia, by her said Act of March 23, 1860; that is to say, only a period of about nine months prior to the first day of January, 1861, valued said stock at par, and, between said date and the first day of January, 1861, purchased a large amount thereof for cash at that valuation; and this defendant is informed that nothing happened to depreciate the value of the same between the time of the valuation so placed thereon and the purchases thereof made by the State of Virginia at par and the first day of January, 1861; but that, making every allowance for mistakes in the valuation so made by the State of Virginia, and every allowance for depreciation in the value of said stock, this defendant believes that said stock and the property represented by it was reasonably worth on the first day of January, 1861, as well as upon the 20th day of June,

1863, twenty-five per cent. of its par, or the sum of $2,600,000.00;

That the State of Virginia, notwithstanding the fact that the stock in this Company had been purchased with the common funds of the two States, and notwithstanding its value as aforesaid, pursuant to and by virtue of two Acts of its General Assembly, the one passed on February 27, 1879, and the other upon March 4, 1880, donated, without consideration so far as the State of West Virginia was concerned, all of the property of said Company, and authorized and caused said Company to convey the same to the Richmond & Alleghany Railroad Company, upon consideration that the latter would pay certain named debts of the James River & Kanawha Company, and agree to construct and operate a railroad along the tow-path of the canal of the James River & Kanawha Company from Clifton Forge, in the State of Virginia, to the City of Richmond, in said State, within a given time, and would guarantee the performance of its said contract by the deposit of $500,000.00 in United States Government bonds.

The road was built by the Richmond & Alleghany Company along the old tow-path of the James River & Kanawha Company, the bonds deposited by the Richmond & Alleghany Company as a guarantee for the performance of its contract withdrawn, and a deed executed by the James River & Kanawha Company to the Richmond & Alleghany Railroad Company on March 4, 1880, conveying the whole of the property of the James River & Kanawha Company described in the Act of February 27, 1879.

This defendant was entitled to 23½% of the

value of said property so given away as of the first day of January, 1861; but the State of Virginia has never paid the same, or any part thereof, unto her, nor accounted to her therefor, in whole or in part.

MONEYS COLLECTED BY VIRGINIA FROM WEST VIRGINIA COUNTIES AFTER THE SEPARATION OF THE TWO STATES.

This defendant is further informed and believes, and upon such information and belief charges, that the State of Virginia, after the division of the old Commonwealth into two States (June 20, 1863), collected large sums of money from several Counties then and now located within the State of West Virginia, aggregating the sum of $225,078.06, the whole of which she avers should be allowed her as a credit upon her just proportion of the Virginia debt.

CASH ON HAND JANUARY 1, 1861.

In addition to the foregoing assets, the Commonwealth of Virginia, on the first day of January, 1861, had cash on hand in her treasury in the sum of $1,104,927.06, which sum of money was derived from assessments and levies upon the subjects of taxation situate both in that portion of the old Commonwealth of Virginia which is now the State of West Virginia and that portion of said Commonwealth that constitutes the State of Virginia.

The amount aforesaid was standing in the treasury of Virginia to the credit of the following funds:

Commonwealth fund	$252,842.67
Literary fund	26,876.08
Board of Public Works fund	5,958.28
Sinking fund	819,250.03
Total	$1,104,927.06

These moneys (or, at least, the portion thereof that was in the sinking fund) this defendant says were applicable by the Commonwealth of Virginia to the discharge of her bonded indebtedness existing prior to the 1st day of January, 1861, or to the accrued interest thereon, and, as this defendant is informed, were in part so applied; that is to say, the Commonwealth of Virginia discharged out of these moneys during the month of January, 1861, or shortly thereafter, the sum of $977,209.88 of unpaid interest that had accrued on her public debt from the first day of July, 1860, to the 31st day of December, 1860, but that, notwithstanding this fact, the interest so accrued and paid has been added to and embraced in the public debt of Virginia existing prior to the 1st day of January, 1861, and this defendant charged with her equitable proportion thereof, although the same had been paid, as aforesaid.

The foregoing assets set forth in detail in this paragraph, excluding the moneys collected from West Virginia Counties by Virginia ($225,078.06), aggregate, as alleged in the first paragraph of this supplemental answer, the sum of $20,810,357.98,

twenty-three and one-half per cent. of which is $4,890,434.13, from which that portion of the bank stocks turned over by Virginia to West Virginia, and amounting to $260,200.00, should be deducted, leaving a balance of $4,630,234.13, to which should be added the whole of the moneys collected by Virginia from West Virginia Counties after the separation of the two States, amounting to the sum of $225,078.06, making a total of $4,855,312.19, to be credited to West Virginia on account of said assets; and this last named sum, when deducted from the sum of $7,182,507.46, ascertained, as aforesaid, to be this defendant's equitable proportion of the Virginia debt, leaves a balance of $2,327,195.27, or the amount offered in compromise by the West Virginia Commission to the Virginia Commission, as hereinbefore set out.

SEVENTH: As another evidence of the value on or about the first day of January, 1861, of the stocks, bonds and other securities and property hereinbefore described, and as a part of the information upon which this defendant has based her allegations hereinbefore made with respect to the value thereof, the defendant respectfully calls the attention of the Court to a statement contained in the message of John Letcher, Esquire, Governor of the Commonwealth of Virginia, submitted to the Legislature of Virginia on September 7, 1863, relating to the debt of Virginia, which had been prepared with great care, as stated by the Governor in said message, and after consultation with the State Auditors of Virginia, and was believed by the then executive of said

State to be accurate and reliable. In this message, the Governor says:

> "We have available stocks belonging to the literary fund, railroad and other stocks belonging to the internal improvement fund, worth in the market, and from which may be realized at any time the State may direct, the sum of.....$16,543,055.35."

In this message, the Governor adds:

> "In addition, the Commonwealth owns $2,340,600.00 worth of bank stock, which will readily command in the market the sum of $3,019,125.00."

The part of Governor Letcher's message dealing with the public debt of Virginia will be filed herewith, marked "Exhibit D", and made a part of this supplemental answer.

EIGHTH: This defendant, further answering, says that she ought not to pay any interest upon any part of the said debt assumed by her until the amount thereof has been definitely ascertained, upon the following grounds:

By Section 8 of Article 8 of her Constitution adopted in 1861, it is provided that—

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation

thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

And this respondent avers that, under this provision of the Constitution, to which the plaintiff assented as the condition of the defendant's admission into the union, there is no promise or obligation upon the part of this defendant to pay any interest already accrued upon the said debt. The obligation is simply to ascertain the equitable proportion thereof, and provide for its payment, and the accruing interest, which means the interest accruing upon that proportion of the debt which West Virginia assumes; nor has there been any contract or agreement upon the part of this defendant, by any of her officers, agents or representatives, obligating her to pay interest upon the said debt.

This defendant further says that, after her formation as a State, she had no opportunity for ascertaining the amount for which she was liable, because of the existence of war between the States, in which the State of Virginia was an active participant; and, shortly after its close, and before the rehabilitation of the State of Virginia as one of the United States, she instituted suit in the Supreme Court of the United States, claiming a part of the territory of West Virginia, to-wit, the Counties of Jefferson and Berkeley, to which suit this defendant was a party, and no decision was rendered therein until the sixth day of March, 1871;

That, in the same month, to-wit, on the thirtieth day thereof, the State of Virginia undertook, without the consent and advice of the State of West Virginia,

to ascertain the per cent. and proportion of said debt herself which West Virginia assumed, and fixed it at one-third of the whole debt, the said State of Virginia declaring that she was only liable for two-thirds;

That thereafter the State of Virginia would not negotiate a settlement so as to determine the amount which West Virginia assumed of the said debt, except upon the sole condition that Virginia was only liable for two-thirds thereof, thus necessarily leaving to this defendant the payment of the other one-third thereof to the State of Virginia.

This defendant further says that she had no power or authority to settle with the creditors of Virginia, because Virginia had full control of the debt, and, had West Virginia attempted a settlement with the creditors of Virginia, whatever she might have done in the premises would not have been binding upon the State of Virginia; and all that was done by Virginia in fixing the one-third of the said debt as the part assumed by West Virginia was with the consent and co-operation of her creditors.

This defendant also says that whatever sum is obtained in this suit is not payable to Virginia for her use and benefit, but is to be turned over to the holders of the unfunded portion of the said debt, and that these holders are private persons; and for this defendant to assume the payment of any interest which has heretofore accrued upon the said debt would be to impose upon her the burden of paying interest to private persons without any act of her own imposing such liability, either by legislation or

by contract entered into by any of her officers or representatives.

In addition to the foregoing matters and things, this defendant further says that no interest should be charged upon West Virginia's portion of the Virginia debt in consequence of the following matters and things, which she now alleges upon information and belief to be true:

I. She is advised, and upon such advice avers, that a large amount of the bonds evidencing the debt of Virginia created prior to the first day of January, 1861, has been lost or destroyed, so that they will never be presented for liquidation, and, to that extent, there is a further reduction of the debt appearing to have been in existence on the first day of January, 1861. This defendant is not advised as to the exact amount of the bonds so lost or destroyed, but avers that they reach a very considerable sum, largely in excess of one million dollars. This appears from the report of the Debt Commission of Virginia submitted on January 14, 1892, wherein, referring to the funding of the debt of $28,000,000.00 by the issuance of new bonds for $19,000,000.00 under the Act of February 20, 1892, the Commission says:

> "There is good reason to believe too that a considerable amount of the old securities of the State have been lost or destroyed, so that the maximum of $19,000,000.00 will probably never be reached."

This defendant avers that she believes that a very large part of the $5,000,000.00 referred to in the

said Act of February 20, 1892, have been lost or destroyed, so that there is no longer any probability whatever that this sum will ever be presented for payment, and any liability predicated thereon.

II. She says that the State of Virginia, as this defendant is informed, has received from time to time, in addition to the amounts hereinbefore set out in paragraph six of this supplemental answer, dividends upon the bonds, stocks and securities hereinbefore described to an amount equal to $5,782,240.09, and did likewise, at the time of the separation of the two States, retain, without accounting unto the State of West Virginia for any part thereof, all of the public buildings, including the Capitol at Richmond, the University at Charlottesville, the penitentiary at Richmond, the State Asylum at Staunton, and various other public buildings and institutions that had been constructed and equipped out of the joint funds of the two States, and worth in the aggregate many millions of dollars, as well as much personal property, consisting of libraries, arms and munitions of war. She also says that Virginia has largely scaled her debt, without West Virginia receiving her full proportionate benefit of such scaling.

And now, having fully answered, this defendant prays that the amount and value of the assets as of January 1, 1861, and as of June 20, 1863, hereinbefore set out, that were acquired prior to said first named date by the Commonwealth of Virginia with the common funds of the two States, and were owned by her on said date, and subsequently appropriated

to her own use in kind, or sold, and the proceeds of such sales so appropriated, or were given away by her, and for which the State of Virginia has not accounted unto the State of West Virginia, in whole or in part, may be ascertained; that twenty-three and one-half per cent. (23½%) of the value of said assets as of the one date or of the other be likewise ascertained, and that the same be applied as a credit upon that portion of the principal of the Virginia debt assumed by this defendant, as heretofore determined by this Honorable Court, and that the balance thus found due and payable by this defendant, if any, be decreed without interest.

A. A. LILLY,
Attorney General for West Virginia.

V. B. ARCHER,
CHARLES E. HOGG,
and
JOHN H. HOLT,
Associate Counsel
for West Virginia.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, s.s.:

This day personally appeared before me, the undersigned Notary Public in and for the County and State aforesaid, Henry D. Hatfield, Governor of the State of West Virginia, and, being by me first duly sworn, says that he has read the foregoing answer, and is familiar with the contents thereof, and that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be upon information, he believes them to be true.

HENRY D. HATFIELD,
Governor of West Virginia.

Taken, sworn to and subscribed before me this eleventh day of March, 1914.

My commission expires on the 26th day of April, 1923.

FRANK LIVELY,
Notary Public.

EXHIBITS.

"EXHIBIT A".

COMMONWEALTH OF VIRGINIA vs. THE STATE OF WEST VIRGINIA.

Washington, D. C., March 4, 1914.

HON. JOHN B. MOON,
Chairman Virginia Debt Commission,
Washington, D. C.

Dear Sir:

The West Virginia Commission has adopted a preamble and resolution embodying a proposition to the Virginia Commission for the settlement of West Virginia's equitable proportion of the Virginia debt, and has requested me to transmit the same to you, and, through you, to the Virginia Commission, in the hope that it may receive early attention and a favorable reply.

Your attention is called to the fact that a list and history of the credits referred to in the resolution are attached to the copy thereof now presented you.

With great respect, I remain,

Very truly yours,

JOHN W. MASON,
Chairman West
Virginia Commission.

Enc.

PREAMBLE AND RESOLUTION OF THE WEST VIRGINIA DEBT COMMISSION, ADOPTED AT A MEETING THEREOF, HELD IN CHARLESTON, WEST VIRGINIA, ON THE 27TH DAY OF FEBRUARY, 1914.

WHEREAS, The Supreme Court of the United States, by its opinion rendered on the 6th day of March, 1911, in the case of the Commonwealth of Virginia vs. State of West Virginia, ascertained the gross indebtedness of the old Commonwealth of Virginia, to the payment of which the State of West Virginia should contribute an equitable proportion, to be $30,563,861.58 (220 U. S., page 1), and,

WHEREAS, in consequence of the relative resources of the two debtor populations, Virginia's portion of said debt was fixed at .7651 and West Virginia's at .235; and,

WHEREAS, as the records of the case then stood, there appeared to be *no stocks of value on hand* that could be treated as assets, and a proper proportion thereof applied to the reduction of the claims against West Virginia, its equitable proportion of the principal of said debt (subject to the correction of clerical errors) was fixed at $7,182,507.46; and,

WHEREAS, since the announcement of the opinion aforesaid, and since the joint conference of the Virginia and West Virginia Debt Commissions, held at Washington on the 25th day of July, 1913, this Commission has discovered that, prior to the establishment of the State of West Virginia out of the territory of the Commonwealth of Virginia on the

20th day of June, 1863, the Commonwealth of Virginia purchased, and became the owner of certain stocks, bonds, securities and other property, which were paid for out of the common funds of the two States,—in fact were purchased mainly, if not altogether, out of the proceeds of the bonds that constitute the debt of the old Commonwealth of Virginia in question here—and was the owner and holder of said stocks, bonds, securities and other property on the 1st day of January, 1861, and after the 20th day of June, 1863, sold and disposed of many of said stocks, bonds and securities, and realized in cash therefor, and appropriated to its own exclusive use many millions of dollars and gave away without the consent or knowledge of the State of West Virginia other portions of said assets and property which were of great value, not only on the 1st day of January, 1861, but at the time they were so given away, and has retained and still retains other portions of said assets and property which not only have a present value, but were of great value on the 1st day of January, 1861, that is to say, of the aggregate value as of the 1st day of January, 1861, of $20,810,357.98; and,

WHEREAS, according to the apportionment of the debt made by the Supreme Court between the two States, West Virginia is entitled in equity, as a credit upon the part of said debt allotted to it, to .235 of the aggregate value as of January 1, 1861, of said stocks, bonds, securities and other property, whether the same had been sold, retained or given away by the State of Virginia; that is to say, to the sum of $4,855,312.18, including cash on hand as of that date,

and the additional sum of $225,078.06 collected by the Commonwealth of Virginia, from West Virginia counties after June 20, 1863, which, if deducted from its allotment of $7,182,507.46, would leave a balance of $2,327,195.28, principal to be paid by the State of West Virginia; and,

WHEREAS, in consequence of the great lapse of time and the long delay on the part of Virginia to have its rights and the liability of West Virginia in the premises judicially determined, also in consequence of the fact that Virginia has received from time to time, in addition to the amounts heretofore set out, dividends upon the bonds, stocks and securities hereinbefore described to an amount equal to $5,782,240.09, and in consequence of the further fact that a part of said bonds has been mislaid, lost or destroyed and will never be presented for payment; and many of the remaining bonds were purchased by the present holders thereof at nominal prices, and in consequence of the fact that Virginia at the time of the separation of the two States retained, without an accounting unto the State of West Virginia for any part thereof, all of the public buildings, including the Capitol at Richmond, the Penitentiary in that City, the State Asylum at Staunton, the University at Charlottesville, and various other public building and institutions that had been constructed and equipped out of the joint funds of the two States, as well as much personal property, consisting of libraries, arms and munitions of war, etc., and in consequence of the further fact that Virginia has largely scaled her debt without West Virginia receiving her full proportionate benefit of such scaling, to say noth-

ing of the legal reasons that might be presented in opposition to such a charge, no interest should be charged upon West Virginia's alloted proportion of the principal of said debt;

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

I. That this Commission propose, and it does here now propose, to the Virginia Commission that .235 of $20,810,357.98, or the sum of $4,890,434.12 of the value of the stocks, bonds, securities and other property hereinbefore recited, and described in the list hereto appended, be allowed by the Commonwealth of Virginia as a credit upon, and that the same be deducted from the sum of $7,182,507.46 ascertained as aforesaid, to be the equitable proportion of the principal of the debt of Virginia assumed by the State of West Virginia, and that the balance so ascertained, that is to say, the sum of $2,327,195.28 be accepted by the Commonwealth of Virginia in full settlement, both principal and interest, of West Virginia's proportion of the Virginia debt.

II. That in the event the Virginia Commission consent to the foregoing proposition, then this Commission will at once make a report of the fact to the Governor of the State of West Virginia, accompanied with the recommendation that the State of West Virginia pay unto the Commonwealth of Virginia the sum of $2,327,195.28, in full settlement of the present controversy; and the Governor of West Virginia will at once, pursuant to the terms of the joint resolution of the Houses of the West Vir-

ginia Legislature establishing this Commission, adopted on the 21st day of February, 1913, convene the Legislature of the State of West Virginia, for the purpose of adopting or rejecting the foregoing proposition of this Commission, and for the purpose, in the event of its adoption, of providing the funds without delay for the payment of the amount so agreed upon.

III. That this proposition is made by way of settlement of the present suit and shall in no way affect the rights, or influence the action of the State of West Virginia, in the event of its rejection and future ensuing litigation.

IV. BE IT FURTHER RESOLVED, that the Chairman of this Commission at once transmit to the Virginia Commission a copy of this resolution, with the appendix thereto, with the request that the same be at once considered and acted upon at an early day.

JOHN W. MASON,
WILLIAM D. ORD,
J. A. LENHART,
R. J. A. BOREMAN,
HENRY ZILLIKEN,
JOSEPH S. MILLER,
U. G. YOUNG,
JOHN M. HAMILTON,
W. T. ICE, Jr.,
West Virginia Debt Commission.

Analysis of report of Accountants, classifying the Credits to which the West Virginia Debt Commission believes the State of West Virginia is entitled, dividing the same into classes marked from A to G, inclusive.

CLASS A.

CASH.

The credit assigned to Class A consists of cash on hand in the treasury of the State of Virginia on the 1st day of January, 1861, amounting to $1,104,927.06, which sum was allotted to the following funds in the following amounts; that is to say:

In the Commonwealth Fund	$252,842.67
In the Literary Fund	26,876.08
In the Board of Public Works Fund	5,958.28
In the Sinking Fund	819,250.03
Total	$1,104,927.06

CLASS B.

Stocks purchased by the State of Virginia with the common funds of the two States prior to January 1, 1861, unsold, still owned and unaccounted for by the State of Virginia.

The asset assigned to this class consists of 2,752 shares of stock in the Richmond, Fredericksburg and Potomac Railroad Company, of the par value of $100 each. This stock was bought by the State of Virginia under acts of January 23, 1835, page 87 of Accountant's Report, and March 23, 1836, page 95 of said report, for the cash price of $275,200.00, and

has never been disposed of by her, but is still owned by the State of Virginia, and had a valuation as of the 1st day of January, 1861, of at least $275,200.00.

Total..... $275,200.00

CLASS C.

Proceeds of sales of securities purchased with common funds of the two States by the State of Virginia prior to the 1st day of January, 1861, and sold by the State of Virginia without the knowledge or consent of West Virginia, and without accounting therefor.

1.	Orange & Alexandria Railroad Co., stock and loan.....	$1,156,210.98
2.	Richmond & Danville Railroad Co., stock and loan	1,653,423.04
3.	Richmond & Petersburg Railroad Co., stock	578,404.13
4.	Virginia Central Railroad Co., stock and loan	321,458.17
5.	Blue Ridge Railroad Co., built by State of Virginia.....	705,280.82
6.	Alexandria, Loudoun & Hampshire R. R. Co., stock.....	68,044.51
7.	Winchester & Potomac Railroad Co., loan reduced by annuity.....	83,333.33
8.	Virginia & Tennessee Railroad Co., loan	992,030.32
9.	Southside Railroad Co., loan	91,897.66
10.	Norfolk & Petersburg Railroad Co., loan	165,024.49

11.	Roanoke Navigation Co., stock	3,832.00
12.	Alexandria Canal Co., stock	816.00
13.	Upper Appomattox Co., stock	16,144.26
14.	Dismal Swamp Canal Co., stock	24,839.98
15.	Loan to Washington College.....	2,000.00
16.	Richmond Academy Bonds	400.00
17.	Claim against U. S. Government	298,369.74
18.	Claim against Selden-Withers Co.	152,023.04
	Total.....	$6,313,532.47

CLASS D.

Interest on loans and dividends on stock accrued prior to January 1, 1861, upon common investments, and collected by the State of Virginia after January 1, 1861, and still unaccounted for:

1.	Orange & Alexandria Railroad Co.	$18,144.29
2.	Richmond & Danville Railroad Co.	8,516.80
3.	Richmond & Petersburg Railroad Company	43,048.00
4.	Virginia Central Railroad Co.....	182,436.36
5.	Winchester & Potomac Railroad Co.	833.33
6.	Richmond, Fredericksburg & Potomac Railroad Co.....	157,662.07
7.	Virginia & Tennessee Railroad Co.	211,891.82
8.	Southside Railroad Co.....	204,602.34
9.	Norfolk & Petersburg Railroad Co.	45,900.00
10.	James River & Kanawha Co.....	250.00

11.	Loan to Washington College.....	60.00
12.	Richmond Academy Bonds.....	12.00
13.	Claim against United States Government	832,451.57
14.	The Farmers' Bank of Virginia...	33,691.00
15.	Bank of Virginia	33,726.70
16.	Bank of the Valley.....	16,936.50
17.	Exchange Bank	30,642.50
18.	Northwestern Bank	13,104.00
19.	Fairmont Bank	1,500.00
	Total.....	$1,835,409.28

CLASS E.

Bank stock purchased by Virginia with joint funds prior to January 1, 1861, and in her possession on that date:

1.	Farmers' Bank of Virginia.....	$962,600.00
2.	Bank of Virginia.....	963,620.00
3.	Bank of the Valley.....	483,900.00
4.	Exchange Bank	875,500.00
5.	Northwestern Bank	374,400.00
6.	Fairmont Bank	50,000.00
	Total.....	$3,710,020.00

CLASS F.

Railroad stock purchased by the State of Virginia out of the common funds of the two States in various railroads, prior to the first day of January, 1861, and sold by her subsequent to the 20th day of June, 1863, without the knowledge or consent of

West Virginia, and for which she has never accounted.

Prior to January 1, 1861, the State of Virginia, with common funds, bought stocks of and made loans to each of the following railroad companies:

Virginia & Tennessee Railroad Co.
Southside Railroad Co.
Virginia & Kentucky Railroad Co.
Norfolk and Petersburg Railroad Co.,

and from time to time sold portions of said stock until she had left on hand stock therein and residue of loans that cost her:

Virginia & Tennessee Railroad Co., stock	$2,300,000.00
Southside Railroad Co., stock	803,500.00
loan	708,102.34
Virginia & Kentucky Railroad Co. stock	82,000.61
Norfolk & Petersburg Railroad Co., stock	1,139,970.00
loan	134,975.51
Total	$5,168,548.46,

which residuary stocks she subsequently, that is to say, on the 20th day of December, 1870, sold to the Atlantic, Mississippi & Ohio Railroad Co., for the sum of $4,000,000.00, the purchase price to be paid in

instalments, and took a second mortgage upon the property of the said railroad company to secure the payment of the same. This sale was made and this security taken without the knowledge and consent of the State of West Virginia; and finally after the lapse of many years, the first mortgage upon said railroad company was foreclosed and the property covered thereby sold, but did not bring enough to satisfy the second mortgage and pay the $4,000,000.00 purchase price agreed to be paid to Virginia for these stocks. After the foreclosure sale, that is to say, on the 1st day of March, 1882, the re-organization of the Atlantic, Mississippi & Ohio Railroad Company paid unto the State of Virginia the sum of $500,000.00 for her second mortgage rights, whatever they may have been. Virginia has never accounted to West Virginia, either for a proportionate part of the $4,000,000.00 original purchase price, or the $500,000.00 subsequently received.

It will be seen that the value placed upon these stocks, both by the State of Virginia and by the railway company purchasing them, was $4,000,000.00; and this can be taken as their reasonable value as of January 1, 1861.

Total.....$4,000,000.00

CLASS G.

Securities purchased with joint funds by the State of Virginia prior to January 1, 1861, and subsequently given away without the knowledge or consent of West Virginia, together with certain other railroad and canal securities appropriated by her

in one way and another, but not hereinbefore recapitulated:

James River & Kanawha Co., 104,000 shares	$10,400,000.00
Residue of Securities,	
Manassas Gap Railroad	2,105,000.00
Roanoke Valley Railroad	307,402.00
Fredericksburg & Gordonsville R. R.	132,399.00
Richmond & York River R. R.	490,999.52
Rappahannock Company	179,500.00
Rivanna River Navigation Co.	227,133.00
Smiths River Navigation Co.	4,083.12
Slate River Co.	21,000.00
Kempsville Canal Company	13,650.00
Hazel River Navigation Co.	63,079.58
Goose Creek & Little River Co.	58,255.35
Dragon Swamp Navigation Co.	1,464.00
Chesapeake & Ohio Canal Company	281,111.11
Total	$14,285,076.68

The foregoing $10,400,000.00 attributed to the James River & Kanawha Company was the par value of its stock, and, although the State of Virginia by an act of the General Assembly passed on the 23d day of March, 1860, something less than nine months before January 1st, 1861, placed a value of par thereon and made purchases thereof at such valuation, yet so much time has elapsed and the evidence of the actual value of this stock as of that date has become so obscure, that it has been thought best, out of a spirit of compromise, to place a value thereon of

twenty-five per cent. of its par value, or the sum of $2,600,000.00.

The other securities embraced in this class (amounting to $3,885,076.68) have been treated in the same way for the same reason, and their value placed herein at twenty-five per cent. of their par value, or the sum of $971,269.17.

Total ..... $3,571,269.17.

In addition to the foregoing, the State of Virginia after the division of the old Commonwealth into two States, June 20, 1863, collected large amounts of money from several counties then and now located in the State of West Virginia, aggregating the sum of $225,078.06.

RECAPITULATION.

Class A		$1,104,927.06
Class B		275,200.00
Class C		6,313,532.47
Class D		1,835,409.28
Class E		3,710,020.00
Class F		4,000,000.00
Class G		3,571,269.17
Total		$20,810,357.98
West Virginia Equity .235		$4,890,434.12
Less Northwestern Bank Stock	$210,200	
Fairmont Bank Stock	50,000	260,200.00
Balance		4,630,234.12

Collected from West Virginia Counties	225,078.06
Total Net Equity.....	$4,855,312.18

RESULT.

West Virginia's Share of Debt.....	$7,182,507.46
Less Net Equities as above.....	4,855,312.18
Balance.....	$2,327,195.28

NOTE.

Subsequent to the 1st day of January, 1861, the Commonwealth of Virginia has received as dividends and interest upon the securities and loans hereinbefore listed the sum of $5,782,240.09, as follows:

INTEREST AND DIVIDENDS RECEIVED BY VIRGINIA IN CASH AFTER JANUARY 1, 1861, FROM ASSETS HELD JANUARY 1, 1861, AND EXCLUSIVE OF ANY DIVIDEND OR INTEREST UP TO JANUARY 1, 1861.

Interest		Dividends	Total
Cash	Va. Bonds	Cash	
Orange and Alexandria R. R.			
$113,459.00	$81,311.34	$66,516.09	$261,286.43
Richmond & Danville R. R.			
380,497.66	281,322.35	249,605.67	911,425.68
Virginia Central R. R.			
86,385.03	72,174.40	387,404.65	545,964.08
Richmond & York River R. R.			
		54,009.94	54,009.94

Richmond, Fredericksburg & Potomac R. R.			
24,012.71	.....	1,282,198.74	1,306,211.45
Virginia & Tennessee R. R.			
137,762.86	.....	138,000.00	275,762.86
Norfolk & Petersburg R. R.			
69,561.41	.....	82,800.00	152,361.41
Roanoke Navigation Co.		2,800.00	2,800.00
Upper Appomattox Co.		6,150.00	6,150.00
Richmond & Petersburg R. R.			
1,703.81	.....	227,504.00	229,207.81
Winchester & Potomac R. R.			
4,166.67	35,184.79	.....	39,351.46
Southside R. R.			
192,000.00	.....	.....	192,000.00
Washington College			
4,140.00	.....	.....	4,140.00
Richmond Academy			
816.00	.....	.....	816.00
U. S. Government			
.....	575,837.52	.....	575,837.52
Farmers Bank of Virginia			
.....	.....	373,007.50	373,007.50
Bank of Virginia			
.....	.....	370,993.70	370,993.70
Bank of the Valley			
.....	.....	94,360.50	94,360.50
Exchange Bank			
.....	.....	343,633.75	343,633.75
Northwestern Bank			
.....	.....	42,920.00	42,920.00
Total			
1,014,505.15	1,045.830.40	3,721,904.54	5,782,240.09

"EXHIBIT B".

Washington, D. C., March 4, 1914.

HON. JOHN W. MASON, Chairman,
West Virginia Commission,
Washington, D. C.

Dear Sir:

VIRGINIA vs. WEST VIRGINIA.

I beg to hand you, herewith, the resolutions adopted by the Virginia Debt Commission in response to the proposition submitted to them this day by the West Virginia Commission.

With great respect, I am,

Very truly yours,

JOHN B. MOON, Chairman,
Virginia Debt Commission.

VIRGINIA vs. WEST VIRGINIA.

Resolutions of the Virginia Debt Commission, adopted at a meeting held in Washington, D. C., at the New Willard Hotel, Wednesday, March 4, 1914.

The Virgina Debt Commission having received the proposition submitted this day by the West Virginia Commission, which contains statements and conclusions to which this Commission cannot assent and concerning which it is unwilling to engage in any discussion, adopted the following resolutions:

WHEREAS, the Supreme Court of the United

States, in its opinion delivered at the October term, 1913 (November 10, 1913), in the suit of Virginia vs. West Virginia, on motion of Virginia to proceed to a final hearing, said:

> "In March, 1911 (Virginia vs. West Virginia, 220 U. S. 1) our decision was given 'with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed.' In view, however, of the nature of the controversy, of the consideration due the respective States and the hope that by agreement between them further judicial action might be unnecessary, we postponed proceeding to a final decree and left open the question of what, if any, interest was due and the rate thereof, as well as the right to suggest any mere clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled," and

WHEREAS, The matters left open and referred by the Court to the respective States for consideration and adjustment "in the hope that by agreement between them further judicial action might be unnecessary" were specifically stated to be (1) "what, if any, interest was due and the rate thereof", and (2) "the right to suggest any clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled," and

WHEREAS, The proposition now submitted by the West Virginia Commission does not embrace either of said matters left open by the Court and re-

ferred to the parties litigant for adjustment between them;

IT IS THEREFORE RESOLVED, That the Virginia Debt Commission is unwilling to, and respectfully declines to consider the said proposition;

IT IS FURTHER RESOLVED, That the Virginia Debt Commission hereby expresses its regret that the West Virginia Commission has not seen its way to respond to the opinion of the Court and submit a proposition to adjust the question of interest.

JOHN B. MOON,
Chairman.

J. B. BUTTON,
Secretary.

Approved:

JNO. GARLAND POLLARD,
Attorney General of Virginia.

"EXHIBIT C".

Washington, D. C., March 4, 1914.

HON. JOHN B. MOON,
Chairman Virginia Debt Commission,
Washington, D. C.

Dear Sir:

In response to your communication of this date declining the proposition of the West Virginia Commission made this day looking to a settlement of the Virginia debt, we regret to be under the necessity of calling your attention to the fact that, although you deem the question of interest still open, yet you have offered nothing in reply to the reasons advanced in our proposition why no interest should be charged, and thus close the discussion upon the only point considered by you still to be open. And, so far as the credits advanced by us are concerned, you express an unwillingness even to discuss them, thus leaving us, in the absence of errors therein pointed out by you, with the conviction that they are equitable, and under the necessity of adhering to the terms of a proposition made in an effort to do justice to all.

We deemed it unnecessary to indulge in any interpretation or construction of the opinion of the Supreme Court at this time further than to say that, in our opinion, the Court ascertained West Virginia's proportion of the principal of Virginia's debt to be $7,182,507.46, only because, as the record then stood, there appeared to be *"no stocks of value on hand"* to be applied to the reduction of the same.

These stocks are now discovered and disclosed, and a portion of them, at least, were set forth in the proposition you have declined.

You have, therefore, closed the door to further negotiations, and it is with regret that we cease further effort along that line.

Respectfully submitted,

JOHN W. MASON
WILLIAM D. ORD,
J. A. LENHART,
R. J. A. BOREMAN,
HENRY ZILLIKEN,
JOSEPH S. MILLER,
U. G. YOUNG,
JOHN M. HAMILTON,
W. T. ICE, Jr.,
West Virginia Debt Commission.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

THE COMMONWEALTH OF VIRGINIA,

vs. In Equity.

THE STATE OF WEST VIRGINIA.

BRIEF IN SUPPORT OF MOTION BY WEST VIRGINIA FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER.

I.

The object of this suit is to ascertain the equitable proportion of the debt that Virginia created prior to and existing on January 1, 1861, which West Virginia assumed under Section 8, Article 8 of her Constitution of 1861.

The bill in this case was framed upon the theory that the controversy here was determinable by Section 9 of the Ordinances of Virginia, adopted in 1861, read in connection with the 8th section of Article 8 of the Constitution of West Virginia, adopted in that year.

The Court in its opinion rendered on May 27, 1907 (206 U. S., 290-332), after reciting Section 9 of said Ordinance and Section 8 of Article 8 of this Constitution, said:

> "Reading the Virginia Ordinance and the West Virginia constitutional provision *in paria materia*, it follows that what was meant by the expression, 'that the Legislature shall ascertain' was that the Legislature should ascertain as soon as practicable the pursuit of the method prescribed and provided for the liquidation of the amount so ascertained."

"The method prescribed" here referred to is the one appearing in Section 9 of said ordinance.

The original answer accepted this construction, and the decree of reference sending the case to a master was drafted in the light of this theory of the case.

Such construction of the ordinance and constitutional provision necessarily limited the scope of the original answer and decree of reference, and the inquiry of the master and the character of the evidence receivable by him. But this method prescribed by the ordinance was thought by the Court to be arbitrary, and did not appeal to it in its further consideration of the case (220 U. S., 1-36) as the proper and equitable basis upon which the existing contro-

versy should be determined. Pursuing the more reasonable and equitable method derivable from the ratio of taxable property values in the two States, the Court in its opinion of March 6, 1911 (220 U. S., 1-36), laid down the principle by which the further action of this Court with reference to this case will be governed. The Court established the basis upon which the liability of West Virginia is ultimately to be determined. All other questions affecting the rights and liabilities of the parties are *res integra*.

The Court, fully realizing the long lapse of time since the adoption of the first Constitution of West Virginia, in 1861, the removal by death of all of the men familiar with public affairs of that day in the two States acquainted with the history of Virginia relating to the creation of the original debt, her policy with reference to its liquidation, and the changing administrations of the governments of these States during all the intervening years, wisely refrained from the entry of any decree in the case absolutely fixing the liability of West Virginia, and precluding the Court and the parties from a further consideration of the matters herein involved; but this Court, acting from a high sense of duty and responsibility, and in a spirit of conciliation, in its opinion appearing in 220 U. S., 1-36, said:

> "As this is no ordinary commercial suit, but, as we have said, a quasi-international difference, referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the

> effect of a conference between the parties, which, whatever the outcome, must take place."

This observation addressed to the parties litigant is in effect a suggestion, if not a direction, to them calling for friendly negotiations between the States, having for their purpose a settlement of this controversy without further resort to this Court. As disclosed by the supplemental answer accompanying the defendant's motion, West Virginia so construed this observation of the Court, and acted in good faith upon it, but all efforts at negotiation were fruitless.

It is idle now for us to theorize with reference to the reasons why the State of Virginia declined any consideration, whatever, of the matters submitted to her by West Virginia having for their purpose the composing of existing differences.

It is quite apparent at all events that the only alternative open to West Virginia is to bring into the record of this case, by means of a supplemental answer, the matters of credit to which she is entitled upon the proportion of the debt which the Court has found she should assume.

As shown by the original answer filed in this case, the effort made by West Virginia through her Commission created at the earliest practicable opportunity after the announcement of the Court's opinion on March 6, 1911, was not the only effort on her part to have a conference with Virginia to the end that litigation might be avoided between the States. (Record, pages 149-54.)

An examination of this answer discloses that West Virginia, prior to the adoption of her second

Constitution, created a special committee of citizens of her own State to meet a like committee from Virginia to settle the question of the proportions of the debt to be borne by each of the two States; and Virginia, by her own independent Acts of legislation approved March 30, 1871, and by subsequent Acts, made it impossible to treat with her for an amicable adjustment of the debt, except upon the basis that Virginia was only liable for the two-thirds thereof, thus imposing upon West Virginia the assumption of one-third thereof without her consent.

When the Court in its opinion on March 6, 1911, suggested a conference between the States, it became necessary upon the part of West Virginia to create a new commission for the purpose, which she did at the earliest opportunity, of taking up all pertinent matters relating to the further consideration of this case.

This Commission in the active prosecution of its work, by a laborious and hasty examination of the archives of Virginia, discovered many assets of great value intended by Virginia, on January 1, 1861, and June 20, 1863, to be used and applied to the discharge of this debt, to the extent of the value of these assets. The State of West Virginia was not informed, and did not know at the time of the filing of her original answer, of the real character of these assets, nor the value thereof, consisting of bonds, stocks and other securities and property, a knowledge of which was acquired through the agency of her said last named Commission, as shown by the proposed supplemental answer accompanying this motion. If the matters contained in this proposed answer

are true, then West Virginia is entitled to a large credit upon the part of the debt assumed by her, and she is pursuing the only course open to her to bring these newly discovered matters of such vital importance to her to the attention of the Court.

II.

Upon a motion to file this supplemental answer the Court will treat all of its allegations as true. If the answer is filed the burden of establishing the truth of its allegations is put upon the defendant by an ordinary replication. If the supplemental answer is permitted to be filed, and the matters in it do not, in equity and good conscience, offer any ground of credit in favor of West Virginia in reference to this debt she must ultimately pay, the Commonwealth of Virginia will take the proper steps to bring this to the Court's attention, and when this question is presented the parties will be given an opportunity to be heard as the Court may to that end direct.

Is there any substantial reason at this time why the matters contained in the proposed supplemental answer should not be considered by the Court? They cannot be duly considered until brought into the record, and the usual practice in a Court of equity to introduce into the case matters arising or coming to the knowledge of the parties after the institution of the suit is by means of a supplemental pleading. This is well established so far as the practice relates to suits affecting individual rights and interests.

Suydam v. Truesdale, 6 McLean, 459, Fed. Cas. No. 13656.

Kelsey v. Hobby, 16 Pet. 269; Talmage v. Pell, 9 Paige Ch. 410.

..... 2 Ves. & B., 16.

Caster v. Wood, Baldw. 289, Fed. Cas. No. 2, 505.

Thames & Mersey Marine Ins. Co. v. Continental Ins. Co., 37 Fed., 286.

Huffman v. Hummer, 17 N. J. Eq., 269.

Foot v. Silsby, 1 Blatch, 545, Fed. Cas. No. 4918.

Freeman v. Michigan State Bank, Har. Ch. (Mich.), 311.

Tillinghast v. Champlin, 4 R. I., 128.

The text writers announce the same doctrine as that found in the cases just cited.

21 Enc. Pl. & Pr., 43.

1 Dan. Ch. Pr. (6th Am. Ed.) bot. p. 773 discussing the subject of the amendment of answers.

Fletcher, Eq. Pl. & Pr. pp. 421, 422.

Jennison, Ch. Pr. (2nd rev. Ed.) 166.

Van Zile, Eq. Pl. & Pr. No. 269.

EXCERPTS FROM DECISIONS AND TEXT BOOKS.

"Where a defendant had answered to a matter generally, of which he had no particular knowledge, he was allowed to file a supplemental answer on the same subject, after he had acquired particular information concerning it. He may introduce into such answer new matter which has come to his knowledge since filing the original answer on furnishing the opposite party with

the names of the witnesses by whom he expects to prove it."

Caster v. Wood, Fed. Cas. No. 2505, Bald. 289.

"Where new matters of defense are discovered to a suit after the filing of the defendant's answer, but which matters existed before the answer was put in, the proper course for the defendant is to apply for leave to file a supplemental answer. And it seems such matters of defense cannot be set up in the cross-bill only."

Talmage v. Pell, 9 Paige Ch. (N. Y.), 410.

"The proper course, where a new matter of defense is discovered after the putting in of the answer, but which existed before, appears to be to apply for leave to file a supplemental answer, setting up such defense, instead of resorting to a cross-bill merely."

..... 2 Ves. & B., 16.

"A supplemental answer, as observed in Talmage v. Pell, is the proper course where a new matter of defense is discovered after the putting in of the answer, but which existed before; 9 Paige, 413. But as the application is to the discretion of the court, it is essential that the new matter of defense should have been recently discovered. If known before the answer was filed, the application will of course be refused, especially if the introduction of the new matter is calculated to embarrass the further pro-

ceedings in the case, and is not essential as substantial matter of defense."

Suydam v. Truesdale, Fed. Cas. No. 13656, 6 McLean, 459.

In Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S., 397, 32 Law. Ed., 788, the Court, in its opinion, holding that the Circuit Court properly decided that the rights of the parties were not governed by British law and whether such law differed from our law was not open for consideration under the pleadings, said:

"But it appears by the supplemental record, certified to this court in obedience to a writ of certiorari, that after the circuit court had delivered its opinion and filed its findings of fact and conclusions of law, and before the entry of a final decree, the appellant moved for leave to amend the answer by averring the existence of the British law and its applicability to this case, and to prove that law; and that the motion was denied by the circuit court, because the proposed allegation did not set up any fact unknown to the appellant at the time of filing the original answer, and could not be allowed under the rules of that court. 22 Blatchf. 402-404.

On such a question we should be slow to overrule a decision of the circuit court. But we are not prepared to say that if, upon full consideration, justice should appear to

require it, we might not do so, and order the case to be remanded to that court with directions to allow the answer to be amended and proof of the foreign law to be introduced. The Adeline, 13 U. S., 9 Cranch, 244, 284, 3 Law. Ed., 719; The Marianna Flora, 24 U. S., 11, Wheat. 1, 38, 6 Law. Ed., 405; The Charles Morgan, 115 U. S., 69, 29 Law. Ed., 316; Merchants Ins. Co. v. Allen, 121 U. S., 67, 30 Law. Ed., 858; The Gazelle, 128 U. S., 474."

"A supplemental answer is the proper course where new matter of defense is discovered since the putting in of the answer, but which existed before."

21 Enc. Pl. & Pr., 43.

The filing of an amended or supplemental answer is addressed to the discretion of the Court, and each case depends very much upon its own merits.

Martin v. Atkinson, 5 Ga., 390.

Welch v. Arnett, 46 N. J. Eq., 548; 22 Atl., 124.

Ritchie v. McMullen, 79 Fed., 522; 25 C. C. A., 50, modifying decree in S. C., 64 Fed; certiorari denied, 168 U. S., 710; 42 Law. Ed., 1212.

There is an extended consideration of the practice relating to the amendment of answers by Mr. Justice Story in Smith v. Babcock, Fed. Cas. No. 13008, 3 Sumn., 583, and from the syllabus of which (pt. 5) we take the following:

"The whole matter is in the discretion of the court; but, before the amendments to the answer are allowed, the court should be satisfied, that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to."

"Generally it seems to be accepted that the granting or refusing to grant the application for leave to file a supplemental pleading is in the discretion of the court. This may be generally true, but that discretion must be equitably and soundly exercised; and while, perhaps, it can hardly be said that there are facts and circumstances that will warrant a party in demanding the privilege as a right, still the practice and rules of court are so well established that it would seem that cases might rest upon such strong facts that they would be beyond even the control of discretion and rest rather in the right of the parties to an order permitting the filing of such a pleading. But that rule of law which assumes that the equity court will never abuse its discretion in such cases and will anxiously guard the equities of the parties will perhaps avail in all cases, for, if there is an abuse of discretion in refusing or granting the order, the party has his remedy in the appellate court."

Van Zile, Eq. Pl. & Pr. No. 262, and authorities cited. In another part of his work this same author says:

> "The practice as to filing a supplemental answer is quite like that which prevails when it is desired to file a supplemental bill; it can only be done by obtaining leave of court. Leave is obtained upon application made in the cause for that purpose. The application, or petition to file an amended answer, should set forth all of the reasons upon which the defendant bases his claim to file such an answer; that the defendant did not know, at the time of answering, the facts which he proposes to allege in the proposed supplemental answer * * * * * * * *. The application must be sworn to or accompanied with an affidavit verifying the facts upon which he bases it. But where the application alleges matters which are good legal reasons, and where it is apparent that to deny the application would be to inflict injustice upon the defendant, the court will grant it. The better practice, however, is that which is required in some jurisdictions, namely, to accompany the application for leave to file an amended answer with the answer which the defendant desires to file as his supplemental answer in the cause that the court may determine the character of the new answer, whether it contains such a defense as the defendant in justice and in equity ought to be permitted to make, and whether equity and good conscience demand that permission to file it be granted. This application to file a supplemental answer may be made at any time during the pendency of the cause."

Van Zile, Eq. Pl. & Pr. No. 270 and authorities cited.

It is needless to mention the fact to this Court that all these cases relate to the practice of Courts of equity, governed by prescribed rules controlling largely the practice therein, and involving the rights and liabilities of individual private suitors, personally familiar with the matters pertaining to their own defenses, and to indulge a relaxation of the well settled practice in such cases would open the door to fraud and perjury, and, to avoid this, the Courts have been reluctant in permitting amended and supplemental answers to be filed in suits between individuals. But even in such cases the Courts refuse to be bound by technical rules, departing from them when the ends of justice will be thereby promoted.

In this connection this Court, in Stickney v. Wilt, 90 U. S., 150-164, 23 Law. Ed. at p. 54 in its opinion, speaking of the effect in that case of an observance of its rules relating to appellate practice, said:

> "Rules of practice are established to promote the ends of justice, and where it appears that a given rule will have the opposite effect, appellate courts are inclined to regard the case as one of an exceptional character."

Rules of Court are not made to defeat the ends of justice, but for the orderly dispatch of business, and to regulate its course and manner of procedure. If a rigid adherence to a rule will not reach the merits of a case, it will be disregarded. This is the prin-

ciple by which the action of this Court is controlled, even in a case involving private rights and interests.

In Kelsey v. Hobby, 16 Pet., 269; 10 Law. Ed., 961, the Court declares in the syllabus that—

> "There is no propriety in requiring technical and formal proceedings when they tend to embarrass and delay the administration of justice; unless they are required by some fixed principles of equity law or practice, which the court would not be at liberty to disregard."

III.

This Court is not hampered by any rules in the exercise of its original jurisdiction. It considers, however, the former practice in the courts of King's Bench and of chancery in England as affording outlines for the practice thereof, and will, from time to time, make such alterations therein as circumstances may render necessary.

Rule 3.

In California v. Southern Pac. Co., 157 U. S., 259, 39 Law. Ed., 694, the Court said:

> "And in cases of original jurisdiction it has been determined that this court will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and that the rules of the court of chancery should govern in conducting the case to a final issue; * * * although the court is not bound

> to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice."

This motion for leave to file a supplemental answer in this Court in a case involving the exercise of original jurisdiction is one of first impression, so far as we are advised.

This being a controversy between two sovereign States, the Court will afford the fullest opportunity to each of them to bring into the case every substantial matter in any manner bearing upon its settlement, and the widest latitude will evidently be extended with reference to the mode of procedure to reach this end. The Court will not concern itself with the ordinary rules of equity procedure observed in suits between individual persons. A case of this sort rests upon higher grounds than those involving merely personal rights and liabilities.

In the absence of the jurisdiction of this Court, this controversy could only be settled by arbitration or a resort to force. It is a quasi-international difference, in the determination of which each party is afforded the fullest opportunity, irrespective of any fixed rules obtaining in matters of private suits, to bring to the consideration thereof every fact that may be justly considered in reaching a conclusion.

The Court reviewed the practice followed by it in filing bills in equity in Washington v. Northern Securities Co., 185 U. S., 254; 46 Law. Ed., 897, and concluded its opinion, after reviewing the cases, with this observation:

> "In the exercise of original jurisdiction the court has always necessarily proceeded

> with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending application as was pursued in Louisiana v. Texas; that is, without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the usual practice."

An examination of the cases will disclose that this Court has only recognized certain rules in the exercise of its original jurisdiction as a matter of convenience, rather than of guidance, and probably to avoid confusion and embarrassment to the parties litigant.

Thus, in Florida v. Georgia, 58 U. S., 17 How., 478; 15 Law Ed., 181, and especially at page 189 of the latter report, we find the Court saying:

> "But the power and propriety of deviating from the ordinary chancery practice, when the purposes of justice require it, have been constantly recognized, and were distinctly asserted in the case of Rhode Island v. Massachusetts, 14 Pet., 247, and again in the same case in 15 Pet., 273, and was recognized in the case of New Jersey v. New York, 5 Pet., 289."

There is no rule of practice binding upon this Court or obligatory upon the parties to this controversy operating to deny this motion to file a supple-

mental answer. Its allegations for the purposes of the motion are admitted to be true. Notice of the motion has been duly given, accompanied by a copy of the motion containing the facts and objects thereof, and also a copy of the proposed supplemental answer.

If Virginia has applied to her own purposes the equitable proportion of West Virginia in the stocks and bonds and other securities set out in said proposed answer, thereby diverting them from the purpose intended when they were acquired, and for which they were intended on January 1, 1861, and on June 20, 1863, should not Virginia account for them in this suit, and thus do equity with reference to the settlement of this controversy. These assets were within the possession and control of Virginia from the time of their acquisition, and the evidence thereof preserved in her own archives. She cannot be prejudiced by the filing of this proposed supplemental answer, because the existence of the assets available for the purposes of this suit does not depend upon oral testimony, but upon record evidence now in the possession of the plaintiff, the full knowledge of the character and value of which has only been acquired by West Virginia through the agency of her Debt Commission, created in 1913, and long after the filing of her original answer. Although these facts were peculiarly within the knowledge of Virginia, she did not disclose the same.

If the motion to file the proposed supplemental answer be denied by this Court, West Virginia will be required to bear a much heavier burden with reference to this debt than that which rested upon her

before her creation into an independent State. This was not intended, either by her own citizens or those of Virginia. The Constitution provided for an equitable proportion, determinable, as this Court has shown, by her property values, so that her liability is measured just as it would have been had she remained a constituent part of the old State.

If this motion prevails and the supplemental answer is permitted to be filed, the two States are placed upon exact terms of equality as to payment of this debt. Each will pay according to the amount of its taxable property values, and each will share in the same proportion with reference to the assets designed as a part of the resources of the State solely intended for the discharge of this debt. This is equity, and this is the principle underlying the assumption by West Virginia of her proportion thereof.

It is never too late, in advance of a final decree, for a Court of Equity to do complete equity as between the parties before it. And even after final decree, such Court, in a proper case, by a well recognized form of procedure, may modify or reverse the same, and this, too, in cases to which private persons are the parties litigant.

IV.

The usual practice of this Court in the exercise of its original jurisdiction in equity cases is to hear the application for the filing of an original bill *ex parte*.

Washington v. Northern Securities Co., 185 U. S., 254, 255; 46 L. Ed., 897;

Georgia v. Grant, 5 Wall., 241; 18 L. Ed., 848.

Under special circumstances the Court hears argument as to the right of the party to file the bill as in the case of Mississippi v. Johnson, 4 Wall., 475; 18 L. Ed., 437. The bill in this case of Mississippi v. Johnson was sought to be filed against the President of the United States, and the Court directed argument to be heard on the right to file the bill.

Ordinarily a motion for leave to file a bill is granted by this Court as a matter of course.

Louisiana v. Texas, 176 U. S., 1; 44 L. Ed., 347;

Washington v. Northern Securities Co., 185 U. S., 254, 255; 46 L. Ed., 897;

Georgia v. Grant et al., 73 U. S., 241, 242; 18 L. Ed., 848.

Pursuing this practice of permitting a bill to be filed as a matter of course, the defendant then appears, and the question as to whether or not the bill ought to be entertained by the Court is made the subject of argument, and both parties have an opportunity of presenting their respective contentions. It suggests itself to us that this is the practical as well as the proper course to pursue, as it relieves the Court of making an examination into the merits of the case *ex mero motu*, and without the aid of argument.

In the case now before the Court, the application is for leave to file a supplemental answer, for the

purpose of bringing into the record matter of defense not heretofore considered by the Court, and not inconsistent with anything heretofore done by the defendant in the cause, or decided by the Court on the matters already before it. Ought not this supplemental answer to be filed as matter of course, the Court affording the parties an opportunity to argue its merits at a future day to be fixed by the Court, in analogy to the filing of original bills? In this way every form of objection that may be urged against the answer can thus be made and duly considered.

It is settled by this Court that in a case in which two sovereign States are contesting a question of boundary, the utmost liberality of practice should unquestionably be adopted in order to enable both parties to present their claims in their full strength.

Rhode Island v. Massachusetts, 14 Pet., 210; 10 L. Ed., 423;

Iowa v. Illinois, 150 U. S., 238, 242; 38 L. Ed., 145.

Will not the Court apply the same principle in a controversy of the character here involved as it does in cases involving disputes in reference to boundaries?

The rules which govern Courts of equity as to the allowance of time for filing an answer, and other proceedings in such suits between individuals, will not be applied by the Supreme Court of the United States to the States of the Union. The parties in such cases must, in the nature of things, be incapable of acting with the promptness of individuals.

Rhode Island v. Massachusetts, 13 Pet., 23; 10 L. Ed., 41.

We respectfully submit that this Court, in view of the amount involved and the high parties to the controversy, will not be over anxious to find a reason or ground for the rejection of this motion, nor to impute gross negligence to a State in not bringing to the Court's attention sooner the matters contained in the proposed supplemental answer.

The Court also fully appreciates the difficulty encountered by the State of West Virginia in fully acquainting herself with the facts and circumstances attendant upon the adoption of her first Constitution in the year 1861, by which she assumed an equitable proportion of this debt, after the long lapse of time since that day, and the consideration which actuated her representatives and her people in assuming an equitable proportion thereof by this means; and that what might be considered inexcusable delay or want of diligence on the part of an individual cannot justly be applied to a sovereign State, and especially when the means of information necessary to prepare a complete defense lie beyond her own borders and within the control of the other high party to the controversy.

But any delay will not be treated as a sufficient ground to reject a substantial and equitable defense involving the merits of a controversy, unless such delays amounts to gross negligence constituting *laches* operating to defeat the ends of justice; and that such delay has been seized upon to interpose a defense which cannot be met by the adverse party because of such delay, or unless such delay consti-

tutes a bar under a positive law which the Court must apply. The delay ought to be, in a case of this character, of such nature as to amount to an absolute extinguishment of the ground of defense. It ought to operate to destroy the merits of the defense. In this case no such contention can be supported. It would be absolutely groundless.

The evidence of the defense proposed by the supplemental answer is to be found in the records and official Acts of Virginia. They are now known to be intact. The plaintiff can meet these newly found matters of defense as well now as she could when this suit was instituted. If their validity depends upon evidence, it is as available now as it was then. Time has not operated to deprive Virginia of any ground, if any she has, to defeat this defense that was open to her when the original answer was filed. Her situation with reference thereto has not been changed a particle since then. The delay has not operated at all to her prejudice.

We therefore respectfully ask that the motion to file the supplemental answer be allowed, to the end that full justice be done between the parties.

A. A. LILLY,
Attorney General of
West Virginia.

JOHN H. HOLT,
CHARLES E. HOGG,
Associate Counsel.

FILE COPY.

Office Supreme Court, U. S.
FILED
APR 13 1914
JAMES D. MAHER
CLERK

[redacted]

[redacted] United States,

[redacted]

[redacted]

[redacted] Complainant,

[redacted] In Equity.

[redacted] Defendant.

[redacted]

NOTICE OF ASSIGNMENT FOR DEFENDANT.

[redacted]

[redacted] Virginia.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.) In Equity.

STATE OF WEST VIRGINIA, *Defendant*.

SUPPLEMENTAL PLEADINGS.

When the State of West Virginia formulated her answer, she was controlled, first, by the direct and specific allegations of the bill impleading her under the provisions of the Wheeling Ordinance, and second, by the express finding of this Court:

> "Reading the Virginia ordinance and the West Virginia constitutional provision in *pari materia*, it follows that what

> was meant by the expression that the 'Legislature shall ascertain' was that the Legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained."

By this finding the method of ascertaining the liability of West Virginia to Virginia, and her "just proportion" of the debt, were to be determined by the Wheeling Ordinance. Therefore, West Virginia was circumscribed, in her defense, by the bill and the opinion overruling the demurrer.

There was no question submitted to the Special Master by the Court requiring the amount and value of all moneys, property, stocks, and credits, which Virginia held, and which belonged to the Commonwealth, at and prior to the dismemberment, to be ascertained and reported.

The only auditing that was done before the special master, embraced that period of time from the beginning of the first indebtedness of Virginia, to-wit, March 17, 1823, to the 1st day of January, 1861, and hence the value and disposition of said stocks and bonds were in no way ascertained or investigated.

In the opinion of March 6, 1911, 220 U. S., 28, this Court held that the eighth section of Article 8 of the Constitution of 1862 governs the liability of West Virginia to Virginia. Then, *for the first time*, West Virginia was called upon for settlement under the Constitution.

Practically the entire debt of the Commonwealth of Virginia outstanding on January 1, 1861,

was incurred for public improvements. This debt was an investment. To make this investment safe, Virginia took the precaution to require, as a condition precedent to extending her aid, the payment or delivery to the Commonwealth of stocks, bonds, or other interest or dividend-bearing securities. These securities, therefore, belonged to the whole State. West Virginia had the same proportional interest therein as this Court has found her proportional liability on account of the public debt. These improvements consisted principally of railroads and canals.

The investigation by the West Virginia Commission, discloses the fact that Virginia, on January 1, 1861, and on June 20, 1863, held stocks, bonds and other securities of banks, railroad companies, canal companies, and other internal improvement companies, of the reasonable value of $20,810,357.98.

THE CONSTITUTIONAL PROVISIONS AFFECTING THE COMMON DEBT OF THE COMMONWEALTH AND THE STOCKS, BONDS AND OTHER SECURITIES HELD IN TRUST FOR THE PAYMENT THEREOF.

THE PROVISIONS OF THE CONSTITUTION OF VIRGINIA OF 1851 IN FORCE JANUARY 1, 1861, AND STILL IN FORCE JUNE 20, 1863, ARE AS FOLLOWS:

> "29. There shall be set apart annually, from the accruing revenue, a sum equal to seven per cent. of the State debt existing on the first day of January, in the year One

Thousand, Eight Hundred and Fifty-Two. The fund thus set apart shall be called the Sinking Fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the Sinking Fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt, as it shall become redeemable. Whenever, after the said first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction; which sum shall be part of the Sinking Fund, and shall be applied in the manner before directed. *The general assembly shall not otherwise appropriate any part of the Sinking Fund*, or its accruing interest, except in time of war, insurrection or invasion.

"30. The general assembly may, at any time, direct a sale of the stocks, held by the Commonwealth in internal improvement and other companies; *but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the Sinking Fund, and be applied in like manner.*"

Constitution of Virginia, 1851; Code 1860, p. 47.

The provisions of the Constitution of the Restored Government of Virginia, of February 13, 1864, in relation to the debt, and in relation to these securities, are as follows:

> "27. The general assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia, proper to be borne by the State of Virginia, and of West Virginia, respectively, and may authorize, in conjunction with the State of West Virginia, *the sale of all lands and property of every description, including all stocks and other interests owned and held by the State of Virginia, in banks, works of internal improvement, and other companies, at the time of the formation of the State of West Virginia*, and no ordinance passed by the convention which assembled at Wheeling on the eleventh day of June, Eighteen Hundred and Sixty-One, adjusting the public debt between Virginia and West Virginia, shall be binding upon this State * * * *.
>
> "28. The general assembly may at any time direct the sale of the stocks held by the Commonwealth in internal improvements, and other companies located within the limits of this Commonwealth, *but the proceeds of such sale, if made before the payment of the public debt, shall be appropriated to the payment thereof.*"

The provisions of the Constitution of the Reconstructed State of Virginia, of December 3, 1867, relating to the debt are as follows:

"Sec. 8. The general assembly shall provide by law a Sinking Fund, *to be applied solely to the payment and extinguishment of the principal of the State debt, which Sinking Fund shall be continued until the extinguishment of such State debt;* and every law hereafter enacted by the general assembly creating a debt, or authorizing a loan, shall provide a sinking fund for the payment of the same.

"Sec. 19. The general assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia, proper to be borne by the State of Virginia and West Virginia, and shall provide that such sum as shall be received from West Virginia shall be applied to the payment of the public debt of the State."

Constitution, 1867-1869; Code of Virginia, 1873, pp. 95, 96.

Under the provisions of the Constitution of Virginia, in force January 1, 1861, and still in force June 20, 1863, the General Assembly was authorized to direct sales of the stocks held by the Commonwealth in internal improvement and other companies; but the proceeds of such sales, when made, should constitute a part of the sinking fund, and be applied in like manner as other funds constituting the sinking fund, which the Constitution, under the provisions of Section 29, directed the Legislature to create and set apart for the purpose of liquidating the debt.

Notwithstanding these constitutional provisions, Virginia, under authority of the General Assembly, made sale of by far the greater part of these securities, and has converted the proceeds of such sales to her own exclusive use, and has not caused the public debt existing on said date to be reduced by the amount and value, or by the proceeds of the sale of such securities, or any part thereof.

West Virginia's claim to her interest in these trust securities, or the proceeds thereof, constitutes a distinct claim against Virginia. The proceeds of these securities is a proper set-off against any claim which Virginia may establish against West Virginia, on account of her constitutional obligation to assume a just proportion of the Virginia debt. West Virginia's demand is one justifiable under the rulings of this Court.

AFTER WEST VIRGINIA BECAME A STATE VIRGINIA BY VARIOUS ACTS OF LEGISLATION RECOGNIZED WEST VIRGINIA'S RIGHTS TO A "FAIR DIVISION OF PUBLIC PROPERTY".

In addition to Sec. 27 of the Constitution of the restored government of Virginia of February 13, 1864, section 3 of a joint resolution of the General Assembly of Virginia, adopted February 28, 1866, Acts 1861-1866, page 453, is as follows:

> "The Commissioners appointed under the foregoing resolution are also empowered and directed to treat with the authorities of West Virginia, upon the subjects of

> a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, *and of a fair division of the public property;* subject, however, to the approval or disapproval of this general assembly."

In the same Acts, at page 458, is a joint resolution adopted February 9, 1866, in part as follows:

> "1. Be it Resolved by the General Assembly of Virginia, That the amounts required by the said Act to be paid to the State of Virginia, shall be held by the State in trust, subject to an adjustment of the debt of the State *and a division of the public property between the States of Virginia and West Virginia*, in case the two States shall not be remitted as one State; provided West Virginia shall by law ratify the said Act."

The General Assembly of Virginia, on February 18, 1870, Acts 1869-1870, Chapter 6, passed the following Act:

> "1. Be it enacted by the General Assembly, That three Commissioners, resident citizens of this State, be appointed by the Governor to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, *and a fair division of the public property; provided*, however, that the action of the said Commissioners shall be subject to the approval or disapproval of this General Assembly."

By a "fair division of the public property" Virginia necessarily meant the stocks, bonds and other securities which she held in trust for the payment of the common debt. *And it was not until March* 30, 1871, *that Virginia attempted to repudiate her constitutional obligations to West Virginia to apply the proceeds of the sale of any of these trust securities to the payment of the common debt outstanding January* 1, 1861. By Section 3 of the Act of March 30, 1871, Acts of Assembly of 1870-1871, Chapter 282, Virginia set apart, arbitrarily, one-third of the debt of the Commonwealth as the proportion of the debt which should be borne by West Virginia. By Section 5 of said Act it was provided:

> "Whatever sum may be realized from the claims of this State against Selden, Withers & Company, and the Chesapeake and Ohio Canal Company, and from the sale or disposition of the stocks and bonds, and debts owned by the State in and against any and all railway and other improvement companies, and all sums which may be realized from the claims of this State against the United States, and from the sales of any real estate now belonging to the Commonwealth, shall be paid into the Treasury of the State to the credit of the sinking fund hereby authorized and created. * * * The Treasurer and Auditor of public accounts, and the second Auditor are hereby appointed Commissioners of the sinking fund, and shall have (a majority acting) the control and management thereof, and shall annually, or oftener, apply whatever sum or sums may be to the

credit of the sinking fund to the purchase and redemption of bonds *issued by authority of this Act.*"

By an Act of the General Assembly of Virginia, approved March 31, 1875, Acts 1874-1875, Chapter 331, entitled "An Act to Consolidate, Re-establish and Regulate the Sinking Fund of the State of Virginia," it was provided:

> "Sec. 6. In all cases in which bonds shall be funded under this Act, West Virginia certificates shall be issued for one-third of the amount, in the name of the said Commissioners, *and shall be held by them as an off-set against any claim which the State of West Virginia may hereafter set up against this State upon final settlement of the respective liabilities of the two States, for the public debt.*"

WEST VIRGINIA HAS NOT BEEN IN DEFAULT UPON THE QUESTION OF AN EQUITABLE ADJUSTMENT OF THE PUBLIC DEBT.

Virginia has continuously and persistently claimed that the failure to earlier adjust the Constitutional obligations of the two States was due to the default of West Virginia. But the records of the States disclose that the fault has not been on the part of West Virginia, but on the part of Virginia. While it is true that Virginia has apparently made some efforts to effect a settlement, such efforts have always been made either at a time when a settlement could not legally be made, or she has offered

settlements which she had disqualified herself from making and carrying into effect, or she has, in her propositions for settlement, imposed such conditions as to prohibit West Virginia from accepting.

The first circumstance to be considered is that the Civil War precluded any settlement between West Virginia and the Confederate State of Virginia. The Commonwealth of Virginia was continued in force in a two-fold aspect: that is, the Restored Government of Virginia and the Confederate State of Virginia. The Confederate State of Virginia continued to exercise its local governmental functions after the adoption of the ordinance of secession, down to the surrender at Appomattox; the legal ending of the Rebellion dates from April 2, 1866. There could be no settlement between the two States, so far as the Confederate State of Virginia is concerned, at any time from June 20, 1863, to April 2, 1866. This period, therefore, must be excluded in considering the circumstances of the asserted default.

Under the provisions of Section 20, Article 4, Constitution of West Virginia of 1863, the Legislature convened annually in regular session on the third Tuesday in January of each year. Under the provisions of Section 24, Article 4, no session of the Legislature after the first session could continue longer than forty-five days without the concurrence of three-fourths of the members. The session of the Legislature for 1866, therefore, was limited to forty-five days from the third Tuesday in January. There was no extension of the session for the year 1866; consequently the session ended before the second of April, 1866.

The first session of the West Virginia Legislature after April 2, 1866, convened on the third Tuesday in January, 1867. This was the first session of the West Virginia Legislature, after the close of the Civil War, at which action could be taken upon the the question of a settlement with Virginia of West Virginia's equitable proportion of the debt of the Commonwealth, proper to be borne by West Virginia.

On February 28, 1866, the General Assembly of Virginia adopted the following resolutions:

> "1. Resolved by the General Assembly of Virginia, that the people of Virginia deeply lament the dismemberment of the old State, and are sincerely desirous to establish and perpetuate the re-union of the States of Virginia and West Virginia; and that they do confidently appeal to the brethren of West Virginia to concur with them in the adoption of suitable measures of co-operation in the restoration of the ancient Commonwealth of Virginia, with all her people, and up to her former boundaries.
>
> 2. That three commissioners, resident citizens of this State, shall be appointed by the joint vote of the two houses of the general assembly, to proceed forthwith to the seat of government of West Virginia, for the purpose of communicating to the Governor and general assembly of that State a copy of the foregoing resolution, and the report of the committee accompanying the same, with authority to treat on the subject of the restoration of the State of Virginia to its ancient jurisdiction and boundaries; provided, that the result of such negotiation, if favorable to such restoration, on

any terms, shall be subject to the approval or disapproval of the Legislatures or conventions of the respective States. as may be hereafter mutually agreed upon.

3. The commissioners appointed under the foregoing resolution, are also empowered and directed to treat with the authorities of West Virginia, upon the subjects of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, and for a fair division of the public property; subject, however, to the approval or disapproval of this general assembly."

Acts of Assembly, 1865, 1866, page 453.

On the first Monday in December, 1866, Virginia filed her bill in equity in this Court against West Virginia, wherein the plaintiff claimed that the counties of Berkeley and Jefferson, over which counties the State of West Virginia claimed jurisdiction, never legally became a part of the State of West Virginia; and the complainant claimed that the division line between the two States should be so changed and established as to include said counties within the boundaries of Virginia. This suit was not determined until March 6, 1871, when the Court sustained a demurrer to the bill.

Virginia vs. West Virginia, 11 Wall., 39.

The institution and prosecution of this suit would necessarily preclude a settlement between the two States until the determination of the action. And consequently, during that period, West Virginia was not in default.

On February 28, 1867, the Legislature of West Virginia adopted the following resolution:

> "Resolved, by the Legislature of West Virginia:
>
> "1. That the people of this State are unalterably opposed to a reunion of this State with the State of Virginia, and will not entertain any proposition looking to that, and
>
> "2. That so soon as the suit of Virginia against this State, now pending in the Supreme Court of the United States, to recover jurisdiction over the Counties of Berkeley and Jefferson, has been finally disposed of, the governor of this State appoint three commissioners on the part of this State to treat with the commissioners appointed by the State of Virginia upon the adjustment of the public debt of said State, as provided in Section Nine, of 'An ordinance to provide for the formation of a new State,' adopted by a convention of the people of Virginia on the twentieth day of August, Eighteen Hundred and Sixty-One, and in Section Eight of Article Eight of the Constitution of West Virginia, and report their action to the governor, to be by him communicated to the legislature of this State for their approval or disapproval."
>
> Acts of West Virginia, 1867, pp. 180-181.

On February 18, 1870, the General Assembly of Virginia passed the following Act:

> "Chapter 6. An Act for the Adjustment of the public debt with the State of West Virginia.

"1. Be it enacted by the general assembly, that three commissioners, resident citizens of this State, be appointed by the governor to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, and a fair division of the public property; provided, however, that the action of the said commissioners shall be subject to the approval or disapproval of this general assembly."

Acts of General Assembly of Virginia, 1869-1870, page 8.

The foregoing Act of the Legislature of Virginia was superseded by a joint resolution adopted by the General Assembly, approved February 11, 1871, Acts of 1870-1871:

"Be it Resolved by the general assembly of Virginia that the governor of this Commonwealth be and he is hereby authorized to tender to the State of West Virginia an arbitration of all matters touching a full and fair apportionment between said States of the said public debt; and in the event of the acceptance of such offer of arbitration by West Virginia, then the governor, lieutenant-governor, president of the court of appeals, auditor of public accounts, and the secretary of the commonwealth, shall appoint two arbitrators on the part of this State, who shall not be citizens of this State, to meet any two arbitrators selected by West Virginia, not citizens of said State. The arbitrators so appointed shall, if they

deem it advisable, appoint an umpire. Said arbitrators and umpire shall, as soon as practicable, proceed to adjust, award and decide, upon fair, just and equitable principles, what proportion of said public debt should be paid by West Virginia, and what part thereof should be paid by this State. Said apportionment, when ascertained and made, to be reported by said arbitrators to the legislatures of said States, to enable them to carry out such award or apportionment by appropriate legislation. Each State may be represented by counsel, and the board hereby directed to appoint the arbitrators for Virginia shall be, and are, hereby authorized to draw on the Treasurer of the State of Virginia, out of any money not otherwise appropriated, a sum sufficient to defray the necessary expenses of this arbitration on the part of Virginia."

On February 15, 1871, the Legislature of West Virginia adopted the following resolutions:

"1. That the Governor, on or after the fifteenth day of March, 1871, appoint three disinterested citizens of this State to treat with the authorities of the State of Virginia on the subject of a proposed adjustment of the public debt of that State prior to the first day of January, eighteen sixty-one, and make report thereof to the Governor, to be printed and communicated by him to the Legislature at the commencement of its next session, for approval or disapproval."

"4. Nothing herein contained shall be construed as waiving or impairing in any

way the rights of this State to jurisdiction over the counties of Berkeley and Jefferson."

"5. That the foregoing resolutions be communicated by the Governor to the Governor of Virginia."

Acts 1871, pp. 278, 279.

On February 24, 1871, the Legislature of West Virginia adopted the following resolution:

"No. 26. Joint Resolution Providing for the Settlement of the Debt Between Virginia and West Virginia.

"Whereas, Any adjustment of said debt should be subject to such ratification; and

Whereas, Citizen commissioners would, of necessity, be more familiar with the circumstances attending the creation of said debt, and the many intricate questions connected therewith, and upon the proper comprehension of which must depend the equitable apportionment and adjustment of the same between said States; therefore,

"Resolved, by the Legislature of West Virginia:

"1. That the tender of an arbitration made by the Governor of the Commonwealth of Virginia to this State, for the adjustment of the public debt of said Commonwealth, having been anticipated by the action of the Legislature of this State, authorizing the appointment of commissioners to treat upon said subject, the said tender is respectfully declined, and the Commonwealth of Virginia is invited to appoint three disinterested citizens as commission-

ers, with authority to treat with like commissioners heretofore authorized on the part of this State. And said commissioners, on behalf of this State, in addition to the powers heretofore conferred, are hereby further empowered to proceed as soon as practicable, to adjust, award and determine, upon fair, just and equitable principles, what proportion of said public debt of Virginia should, in their opinion, be paid by West Virginia, and what part thereof should be paid by Virginia, subject, however, to the approval and ratification of the Legislature of West Virginia and the General Assembly of Virginia.

"2. The Governor of this State is hereby directed to communicate to the Governor of the Commonwealth of Virginia, without delay, certified copies of this preamble and joint resolutions."

Acts of West Virginia Legislature, 1871, pages 281, 282.

In pursuance of said resolution what is commonly known as the "Bennett Commission" was appointed, but the authorities of Virginia refused to treat with or consider said Commission. The Committee ascertained in an ex parte way all data available with regard to said debt and among other things reported as follows:

"We have charged West Virginia with all that we have found expended within her limits, viz.: The amount of the funded debt created for improvements within her territory, the amount invested in her banks, the amount expended on the lunatic asylum at

Weston, and the estimated value of the property known as the Lewisburg Law Library.

"On the other hand, we have credited her with her share of the estimated value of the public property and assets of Virginia, *other than the property represented in the bonded indebtedness. This latter equalizes itself, and therefore does not enter the account. Virginia has the property and owes the debt which it represents* * * *."

From the date of the report of said Commission no action was taken by either state with reference to the other in regard to this debt until the 6th day of March, 1894, when Virginia by an act of her Legislature created her present Debt Commission. This Commission was, as to a settlement with West Virginia, circumscribed by the following provision:

"But said Commission shall in no event enter into any negotiations hereunder, except upon the basis that Virginia *is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof.*"

Thus it remained until the 6th day of March, 1900, the State of Virginia passed an Act in that regard, Section 2, which is as follows:

"2. If at least two-thirds in amount of the said certificates issued under the Act of 1871, exclusive of those held by the State through the agency of the Board of Education and the Sinking Fund Commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so de-

posited or placed, subject to the control of the said Commission, upon the agreement and contract aforesaid, then the said Commission shall be authorized and empowered, by and with the advice and approval of the Attorney-General of Virginia, to take such action and institute such proceedings on behalf of the State as may, in the judgment of said Commission and Attorney-General, be needful and proper to protect the interest of the State and bring about and carry into effect a settlement as aforesaid."

It is very doubtful whether the above act repealed the act of 1894, as to the conditions upon which the Virginia Commission could enter upon negotiations with West Virginia, and besides there was not a sufficient amount of certificates in the hands of said Commission whereby it could treat with West Virginia until about the year 1905 (See Exhibit 8 with the Bill), and in the next year suit was brought.

WEST VIRGINIA SHOULD NOT BE CHARGED WITH INTEREST ON HER EQUITABLE PROPORTION ON THE VIRGINIA DEBT.

FIRST.—Interest is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers.

United States vs. North Carolina, 136 U. S., 211, 216 (Dec., 1890). Approved South Dakota vs. North Carolina, 192 U. S., 321, 386, (Oct. 1903).

United States vs. Sherman, 98 U. S., 565 (Oct., 1878).

United States ex rel. Angarica vs. Bayard, 127 U. S., 251, 260 (Apr., 1888).

Molineaux vs. State, 109 Cal., 378; 42 Pac., 34; 50 A. S. R., 49 (Oct., 1895).

Sawyer vs. Colgan, 102 Cal., 283; 36 Pac., 583.

Davis vs. State, 121 Cal., 211; 53 Pac., 556.

Carr vs. State, 127 Ind., 204; 26 N. E., 778; 11 L. R. A., 370; 22 A. S. R., 624, 637 (Feb., 1891).

Flint, etc., R. Co. vs. Board of State Auditors, 102 Mich., 502; 60 N. W., 971 (Nov., 1894). Affirming principle, but holding that Michigan statute obligated the State to pay interest.

National Home, etc., vs. Parrish, 194 Fed., 940, 941; 114 C. C. A., 576 (April, 1912).

United States vs. Sargent, 162 Fed., 81, 83; 89 C. C. A., 81 (May, 1908).

William R. Trigg Co. vs. Bucyrus Co., 104 Va., 79; 51 S. E., 174, 177 (June, 1905).

West Virginia has not manifested, by any Act of her Legislature, her consent to pay interest on her proportion of the Virginia debt; nor has any lawful contract been made by her executive officers for the payment of interest.

SECOND.—Article 8, Section 8, Constitution of West Virginia, providing that an equitable proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, shall be assumed by the State of West Virginia, constitutes a contract for the payment of such equitable proportion, and is the basis upon which this Court holds West Virginia

liable to the State of Virginia for her equitable proportion of the Virginia debt.

Virginia vs. West Virginia, 220 U. S., 1, 36, 37 (March, 1911).

Virginia vs. West Virginia, 11 Wall., 39, 59 (Dec., 1870).

THIRD.—Virginia is not entitled to interest, for the reason that her claim against West Virginia is unliquidated. The amount of her claim has never been ascertained by any contract, legislative enactment or judicial finding. The proportion of West Virginia's share of the debt, given by the Supreme Court in the opinion of March 6, 1911, is given provisionally. To entitle Virginia to interest, her demand must have been either a fixed, definite sum, or a sum which could be fixed or determined by mere computation.

Mowry vs. Whitney, 14 Wall., 620, 652 (Dec., 1871).

Redfield vs. Ystalyfera Iron Co., 110 U. S., 174; opinion, 176, 177 (Jan., 1884).

Stephens vs. Phoenix Bridge Co., 139 Fed., 248; 71 C. C. A., 374 (June, 1905). Second Circuit.

Pennsylvania Steel Co. vs. New York City R. Co., 198 Fed., 778, 779, 780; 117 C. C. A., 360 (July, 1912). Second Circuit.

The Auditor of Public Accounts vs. Dugger & Foley, 3 Leigh, 241 (Nov., 1831).

Payne vs. Graves, 5 Leigh, 561 (Dec., 1834).

Roper et al. vs. Wren, 6 Leigh, 38 (Feb., 1835).

Phillips et al. vs. Williams, 5 Gratt., 258 (Oct., 1848).

Stearns vs. Mason, 24 Gratt., 484 (March, 1874).
McConico vs. Curzen, 2 Call., 358 (April, 1800).
Skipwith vs. Clinch, 2 Call., 253 (April, 1800).
Waggoner vs. Gray's Admr's, 2 H. & M., 603 (Oct., 1808).
People ex rel. Cranford Co. vs. Wilcox, — N. Y., —; 101 N. E., 174.
Fenichel vs. Zicherman, 139 N. Y. S., 118; — App. Div., —; (Jan., 1913).
Tradesman's National Bank vs. Boldt, 139 N. Y. S., 531; — App. Div., —; (Jan., 1913).
S. C. etc. v. Port Royal, 89 Fed., 565; 22 Cyc. pp. 1510, 1511;
1 Sedgwick on Damages (9th ed.) sec. 312, citing long array of state and federal cases.

Selleck v. French, at page 195, 6 Am. Dec., says:

"In *People v. New York*, 5 Cow., 331, the general principle is stated that 'whenever the debtor knows precisely what he is to pay, he shall be charged with interest if he neglects to pay'; and the same rule is laid down in substantially the same terms in *Hunt. v. Jucks*, 1 Am. Dec., 555; and see *Swett v. Hooper*, 62 Me., 54, to the same effect. As to when an account is considered liquidated, we find a very good rule in *Clerk v. Dutton*, 69 Ill., 521, where it is held that a debt is liquidated when it is certain what is due and how much is due; and although it may appear that something is due, if it does not appear how much is due, the debt is not liquidated. An unliquidated debt is one which one of the parties cannot alone render certain. And in this case it was held that when a party receives notes, property and cash, for which he agrees to execute his promis-

> sory note in a given sum to the party letting him have the same, this will make the account or debt a liquidated one, and interest will be recoverable. And when parties are engaged in continuous dealings, the presentation of bills at different times stating parts of the account does not raise the presumption of liquidation, under which interest is therefore chargeable upon the balances shown to be due: *Raymond v. Williams*, 40 Iowa, 117. But an account may be considered liquidated when on being rendered to the debtor no objection is made: *Walden v. Sherburne*, 15 Johns. 224; *Haight v. McVeagh*, 69 Ill., 624."

Barrow v. Reab, 9 How. (U. S.), 366; 13 Law ed., 177, says:

> "But the general practice, where no statute or usage exists to the contrary, is not to allow interest on unliquidated damages due in cases of ordinary contracts. (Anonymous, 1 Johns., 315; 2 Penn., 652; Peters, C. C. 85, 172, 221; Cotton v. Bragg, 15 East., 223; 3 Gilman, 626)."

FOURTH.—The Constitution of West Virginia, Section 8, Article 8, made the basis of the contract between the two States by the Supreme Court, in the opinion of March 6, 1911, does not provide for the payment of interest. Interest, therefore, is not payable by virtue of the contract, and, if recoverable at all, is only recoverable as damages; and interest, therefore, is merely an incident of the principal debt.

Stewart vs. Barnes, 153 U. S., 456, 462 (May, 1894).

Southern R. Co. vs. Dunlop Mills, 76 Fed., 505 (Nov., 1896); 22 C. C. A., 302. Fourth Circuit.

Graves vs. Saline County, 104 Fed., 61, 63; 43 C. C. A., 414 (Oct., 1900). Seventh Circuit.

FIFTH.—There being no contract therefor interest can only, if at all, be claimed as damages in this proceeding. Virginia delayed the institution of any proceedings from April 2, 1866—the day on which the Civil War ended—to February 26, 1906, a period of thirty-nine years, ten months and twenty-four days. Plaintiff is, therefore, by reason of her laches, barred of any claim on account of interest.

*United States vs. Sanborn, 135 U. S., 271; opinion, 281 (April, 1890).

*Redfield vs. Ystalyfera Iron Co., 110 U. S., 174; opinion, 176, 177 (Jan., 1884).

Redfield vs. Bartels, 139 U. S., 694, 698, 701, 702 (April, 1891).

Mason vs. Wolkowich, 150 Fed., 699; opinion, 706; 80 C. C. A., 435 (Oct., 1906).

Mulliday vs. Machir's Adm's, 4 Gratt., 1 (April, 1846).

Nashua, etc., Corp. vs. Boston, etc., Corp., 61 Fed., 237; opinion, 251, 252 (Feb., 1894). First Circuit.

SIXTH.—In equity, where there is a contract to pay interest, the allowance of interest on unliquidated demands is a matter of discretion. But in all cases where interest is recoverable by way of damages, where the plaintiff has been guilty of laches

in unreasonably delaying the prosecution of his claim, interest will not be allowed.

Redfield vs. Ystalyfera Iron Co., 110 U. S., 174; opinion, 176 (Jan., 1884).
Pennsylvania Steel Co. vs. New York City R. Co., 198 Fed., 778; opinion, 779, 780; 117 C. C. A., 360 (July, 1912). Second Circuit.
Skipworth vs. Clinch, 2 Call., 253 (April, 1800); opinion, 257.

SEVENTH.—Virginia is not entitled to interest for the reason that whatever amount, she is entitled to recover from West Virginia is not due and payable. The amount of the principal has never been liquidated. Therefore, there is no sum *due and payable* upon which interest could be computed. There has been no default by West Virginia so as to render her liable for interest. Default cannot occur in the payment of interest where the sum due is uncertain.

Waggoner vs. Gray's Adm'r, 2 H. & M., 603 (Oct., 1808).

EIGHTH.—From the date of the adoption of the Constitution of West Virginia of 1862, to April 2, 1866, Virginia and West Virginia were engaged in war. The enforcement of all contracts, either between the States of Virginia and West Virginia, or between citizens thereof, was suspended.

Brown vs. Hiatts, 15 Wall., 117; opinion, 185, 186 (Dec., 1872).
Walker vs. Beauchler, 27 Gratt., 511; opinion, 525 (March, 1876).

Fred et al. vs. Dixon et al., 27 Gratt., 541 (March, 1876).

Robert vs. Cocks, 28 Gratt., 207; opinion, 219, 220 (March, 1877).

Tracy vs. Shumate, 22 W. Va., 474; Syl., 6 (Nov., 1884); opinion, 512.

NINTH.—Where interest is recoverable as damages, and not by reason of a contract, the law of the place of performance of the contract will control. In this case, in any event, the performance of this contract was to be in West Virginia.

Coghlan vs. South Carolina R. Co., 142 U. S., 101; opinion, 110, 111 (Dec., 1891).

United States Mortgage Co. vs. Sperry, 138 U. S., 313; opinion, 336, 337 (Feb., 1891).

Scotland County vs. Hill, 132 U. S., 107; opinion, 117 (Nov., 1889).

City National Bank vs. Hunter, 129 U. S., 557; opinion, 577, 578 (March, 1889).

Pana vs. Bowler, 107 U. S., 529; opinion, 546 (Oct., 1882).

Cockle vs. Flack et al., 93 U. S., 344; opinion, 347 (Oct., 1876).

National, etc., Assn. v. Ashworth, 91 Va., 706; 22 S. E., 521; opinion, 532 (July, 1895).

The Mary N. Bourke, 145 Fed., 909; opinion, 911; 76 C. C. A., 441 (April, 1906). Second Circuit.

Sloss-Sheffield, etc. Co. vs. Tacony Iron Co., 183 Fed., 645; opinion, 646 (Dec., 1910); C. C. E. D. Pa. Affirmed 188 Fed., 896; 110 C. C. A., 530 (June, 1911). Third Circuit.

ADDITIONAL REASONS WHY VIRGINIA SHOULD NOT BE ALLOWED INTEREST.

There are numerous equitable reasons why Virginia should not be awarded interest upon her claim against West Virginia, some of which may be briefly stated as follows:

a. It has been within the power of Virginia to have had West Virginia's equitable proportion of the debt judicially determined by this Court at any time during the past forty years, but she has failed and neglected so to do, and must be herself, in consequence, charged with the responsibility of the flight of time, and ought not to be permitted to penalize West Virginia for her own delay;

b. She has received during these years as interest upon loans and dividends upon stocks, made in the one case and purchased in the other with the common funds, and for which no credit is claimed by West Virginia in her supplemental answer, the aggregate sum at least of $5,782,240.09;

c. Many of the bonds in question have been mislaid, lost or destroyed, and the probabilities are will never be presented for payment, and many of the remainings bonds were purchased by the present holders thereof at nominal prices;

d. She has retained, free of charge, and without any claim upon the part of West Virginia of a credit on account thereof, all of the public buildings of the old Commonwealth, including the Capitol at Rich-

mond, the penitentiary in that City, the State asylum at Staunton, the University at Charlottesville, and various other public buildings and institutions that had been constructed and equipped out of the joint funds of the two States, of an aggregate value of at least $3,875,000.00, as shown by the report of the Master in this cause (Record, page) ;

e. She likewise retained and enjoyed much personal property, consisting of libraries, arms and munitions of war, etc., that had been purchased with the common funds, and for no part of which a credit is claimed, and,

f. She has likewise largely scaled her debt, without West Virginia receiving her full proportionate benefit of such scaling.

GENERAL OBSERVATIONS AS TO INTEREST.

It is contended that inasmuch as the debt of Virginia existing on January 1, 1861, was interest-bearing, when West Virginia in her Constitution, ratified in April, 1862, and assented to by Virginia in May of that year, assumed an equitable proportion thereof, that she also and at the same time assumed the payment of interest thereon.

This is a *non sequitur*, because the debt assumed by West Virginia by her constitution of 1862, was her equitable proportion of the debt that Virginia owed on January 1, 1861,—not the increase in that debt accruing thereafter by reason of the accumulation of interest thereon. West Virginia's promise was to Virginia and not to the creditors of Virginia.

West Virginia has nothing to do with any part of the debt arising after January 1, 1861.

Suppose at the first session of the legislature of West Virginia after her creation into a State, which was June 20, 1863, her first Legislature assembling on that day (as it did) had ascertained the proportion she assumed under her constitution, would it be for a moment contended that she also owed Virginia the interest on this amount for the years 1861-1862, and for the time elapsing from January 1, 1863, to the 20th day of June of that year, the time when her Legislature ascertained her equitable proportion thereof? Clearly not, because it was in May, 1862, that Virginia consented through her act of Legislation, to the formation of the new State, to receive from West Virginia an equitable proportion of the debt as it stood on January 1, 1861—being the debt as it existed sixteen months and six days prior to the making of the promise to assume an equitable proportion thereof.

The compact between the two States only contemplates the payment of the interest by West Virginia *after the amount she assumed has been definitely ascertained.* The compact of the two States consists of the Constitution of West Virginia ratified in April, 1862, on the one side, and the Act of the Legislature of Virginia of May, 1862, assenting to the formation of the new State, on the other side.

The only mention made of interest in this Constitution (Art. 8, Sec. 8), which, after declaring that an equitable proportion of this debt shall be assumed by West Virginia, provides that

> "The Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal in thirty-four years."
>
> Const., W. Va. (1862), Art. 8, Sec. 8.

Virginia accepted this constitutional declaration as the full and complete measure of West Virginia's liability. This declaration is silent as to accrued interest, although more than one years' interest had already accrued when Virginia assented to this Constitution, and nearly two and one-half years when West Virginia, taken from the territory of Virginia, became a part of the Union. This contract relates to a debt which Virginia herself had contracted prior to January 1, 1861, and West Virginia only agreed to assume the equitable proportion of it as it existed on that day, although she was admitted into the Union nearly two and one-half years thereafter. Virginia then declared through her Legislature that if West Virginia would assume her just proportion of this debt as created prior to January 1, 1861, and provide, *after the ascertainment of its amount*, for the liquidation thereof, by a sinking fund sufficient to pay the *accruing interest*, and redeem the principal in thirty-four years,—that this would be sufficient to discharge West Virginia from all liability.

The words "accruing interest" referred to that part of the debt which West Virginia assumed after her admission to the Union, and, of course, after she had become an independent State and after, as an

independent State, her *proportion had been ascertained. It does not refer to the interest accruing on the debt of Virginia*, but on a debt which West Virginia shall herself create when she becomes one of the States of the Union, and which is payable to Virginia and not to the holders of the debt.

It will not be overlooked that the *amount* of the liability of West Virginia *is to be* ascertained, and upon this amount she is to pay the accruing interest.

THE MEANING OF "DEBT" AS USED IN CONSTITUTION.

The liability of West Virginia being fixed by her constitution, submitted to a popular vote for ratification, and being so ratified, what is the meaning of the word "debt" as used in Art. 8, Sec. 8, of that instrument? Does it mean the debt of Virginia existing on January 1, 1861, with the unpaid accrued interest thereon at that time, or does it mean not only this, but the interest thereafter accruing until West Virginia's proportion has been ascertained and its liquidation provided for?

This presents the question as to how words used in a State Constitution are to be construed.

On this point the authorities are clear, that in the interpretation of a constitution words are presumed to be employed in their natural and ordinary meaning.

Epping v. City of Columbus, 117 Ga., 263; 43 S. E., 803.

Givens v. Ogden 9 Wheat. (U. S.) in the opinion of Mr. Chief Justice Marshall at page 188.

Miller v. Dunn, 72 Cal., 462; 1 Am. St. Rep., 67.
Carpenter v. People, 8 Colo., at pp. 833-834.
Hale v. Everett, 55 N. H. 9; 16 Am. Rep. in opinion at page 182.
Page v. Allen (58 Pt. St., 338), 98 Am. Dec., 272.
State v. Lessions (84 Kan.) 856, Am. & Eng. Cas. 1912-A, at page 798 in the opinion of the Court quoting 1 Story on the Const. (5 ed. Sec. 451.)

If a word has a technical meaning as well as a popular meaning such word, occurring in a constitution, will generally be accorded its popular meaning by the Courts.

Epping v. City of Columbus, 117 Ga., 263; 43 S. E., 803.
Weill v. Kenfield, 54 Cal., 111.
Sprague v. Norway, 31 Cal., 174.
Miller v. Dunn, 72 Cal., 462, 1 Am. St. Rep., 67.

In Durant v. Iowa City (1 Woolw., 69) Fed. Cas. No. 4189, the Court in the first point of the syllabus decided:

> "Coupons attached to bonds, providing for the yearly interest on the sum named in the bond, do not form part of the principal debt."

In Epping v. City of Columbus (117 Ga., 264), 43 S. E., 803, points 1 and 2 of the syllabus are as follows:

> "1. In interpreting the provisions of a constitution, it is to be presumed that the words therein used were employed in their

natural and ordinary meaning; and, where a word has a technical as well as a popular meaning, the courts will generally accord to it its popular signification, unless the nature of the subject indicates or the context suggests that it is used in a technical sense.

2. Constitutions are the result of popular will, and their words are to be understood ordinarily in the sense they convey to the popular mind."

See reasoning of Court.

In Park v. Candler (113 Ga., 647), 40 S. E., 523, 524, the Court holds in points 15 and 17 of the syllabus that,

"15. The expression 'bonded debt' of a certain corporation, state, etc., in a strictly legal and technical sense, embraces both the principal and interest that may accrue upon a debt of that class.

"17. The term 'bonded debt', as used in paragraph 1, Sec. 13, Art. 7, of the Constitution (Civil Code, Sec. 5900), which provides that the proceeds of the sale of public property shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatever so long as the state has any existing bonded debt, was used in its popular, and not in its strictly legal and technical, sense."

To the same effect are the following cases:

Fudayson v. Vaughn, 54 Minn., 331; 56 N. W., 49.
Herman v. City of Ocanto, 110 Wis., 660; 86 N. W., 681.

The use of the word "debt", as found in Art. 8, Sec. 8, Const. W. Va., 1862, does not contemplate the unearned and subsequently accruing interest on the bonds issued by Virginia prior to Jan. 1, 1861, for two reasons:

First. Because the compact between the States does not expressly so provide. A State is not liable for interest on her obligations in the absence of a valid promise to pay interest. But the Constitution does not bind West Virginia to pay interest upon her equitable proportion only when definitely ascertained, and not till then.

Second. The word "debt" in its ordinary meaning does not include unearned interest on an interest-bearing obligation. This is especially the case when the word debt is used in its popular sense. This view is upheld by the Courts.

It is therefore respectfully submitted that the supplemental answer tendered with defendant's motion on March 23d should be permitted to be filed and West Virginia be credited with her proper equities herein, and no interest should be allowed or charged against her.

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